



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU  
CRIMINAL APPEAL NO. 75 OF 2019  
(CORAM: F. GIKONYO J.)

PETER KIGAMBI MINYORI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence of Hon Sogomo G (PM) dated 1<sup>st</sup> April 2019 in Tigana CRC No. 2 of 2018)

**JUDGMENT**

1. The appellant herein was charged with the offence of defilement contrary to **section 8(1) as read with section 8 (2) of the Sexual Offences act No. 3 of 2006** and 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**. The particulars of the offence were that on the 29<sup>th</sup> Day of December 2017 within Meru County, intentionally caused his male genital organs to penetrate the female genital organs of the **LM**, aged 6 years.

2. On the alternative charge the particulars were that on the same material date and place the appellant touched the female genital organs of **L M**, a child aged 6 years.

3. The trial court found him guilty of the offence of defilement and consequently discharged the alternative count. The trial court sentenced the appellant to thirty years imprisonment.

4. Aggrieved by the aforesaid decision the appellant filed its petition of appeal on 10<sup>th</sup> April 2019 and a supplementary petition thereafter raising six grounds of appeal summarised as hereunder;

**a. That the trial Magistrate erred in both law and fact in failing to note that the medical examination and the report neither supported the element of penetration nor connect the appellant to the offence.**

**b. That the learned trial magistrate erred in both law and fact by failing to note that the evidence adduced by the prosecution witnesses was full of contradiction.**

**c. That the learned trial magistrate erred in both law and fact in convicting the appellant to serve 30 years imprisonment without noting that there was grudge between the appellant and the complainant's mother.**

5. On 12/2/2020 parties agreed to canvass the appeal through written submissions. At the time of writing this judgement (01/4/2020) only the appellant has filed its submissions which I have dully considered. The appellant submitted that whereas the trial court conducted a *voire dire* on the minor, the court did not state whether she presented sworn or unsworn testimony hence due procedure was not adhered to. The appellant opined that the evidence of the prosecution witnesses was contradictory especially at the time of the commission of the offence and the trial court did not also consider the evidence of the clinical officer which clearly showed that there was no penetration. He relied on the cited case of **Pdankerai Ramiksham Pandya v Republic e.a.c.a {1957} pg 336**.

**Analysis and Determination**

6. As this is the Appellant's first appeal, the role of this appellate Court is to re-evaluate the evidence and come to own conclusion, except to give allowance of the fact that it never heard the witnesses. See **Okeno vs. R (1977) EALR 32**.

7. **Pw1 LM** upon the conduct of a *voire dire* by the trial Magistrate testified that she is aged 6 years and a class one student at [particulars withheld]. That on 29<sup>th</sup> December during the morning hours she was at home with her friend W when the appellant called her outside as he wished to tell her something. It was her testimony that the appellant removed her clothes as well as his. That before he could do something W and K arrived and saw what the appellant was doing to her. He then release her and ran away to the market. That W called her back to the house and she later informed her mother what had happened in the evening.

8. It was her testimony that her mother took her to the hospital and they later reported the matter to the police. She also informed the court that she was familiar with the appellant having known him for three years as he comes to their home to work for her mother.

9. **Pw2 Martha Njeri** a clinical officer at Mikinduri Sub County testified that Pw1 was brought to their facility on 30<sup>th</sup> December 2017 with a history of sexual assault. That upon observation the hymen was intact and no tears or laceration on libia major and minor was seen. There was spermatozoa and pus cells when 1 high vaginal swab was conducted. A HIV test conducted was non-reactive. It was her opinion that the minor had sustained non preventive defilement. She also stated that they placed the minor on post exposure propilatis. He presented the p3 form lab report and treatment notes as Pexh 1-3.

10. **Pw3, F K** testified that she received a call at around 7;30 p.m. from K who informed her that the appellant had done something to her daughter. That she called ZN and asked her to go to her home and find out what had happened. She later on boarded a motorcycle and found Z at Mikinduri Police station. She told the court that the following morning Pw1 was taken to a dispensary in Mikinduri. She identified the treatment notes and the appellant on the dock. She stated that she had known the appellant since childhood because he was her neighbour.

11. It was also her testimony that Pw1 was born on 27<sup>th</sup> October 2011. That the information that she had was that the appellant was trying to rape Pw1.

12. **Pw4 WK**, a minor aged 16 years, testified that she was at home together with her siblings on the material date. That at around 7:30 p.m. K alerted him that the appellant was doing something to Pw1. That she went outside and found the appellant had removed his clothes to the knee level, he had also removed Pw1's skirt and had hoisted her to the waist level having sex with her.

13. That she informed the appellant that she would report him to their mother. She told the court that she later on called Pw3 who later on sent Z to their home. She identified the accused person in court and stated that she had known him for five years. she stated that at the time there were security lights outside hence she could see what the appellant was doing to Pw1 with the aid of the bulb light. That upon the appellant seeing her he fled.

14. **Pw5 Pc Stanley Kipchumba** of Mikinduri Police station testified that on 29<sup>th</sup> December at around 11:05 p.m. Pw1 was escorted to the police station by Pw3, the appellant and members of the public. That it was reported that the appellant had defiled Pw1. That the following morning the minor was taken to hospital where she was treated and issued with a P3 report. The appellant was not known to him prior to the case.

15. On 26<sup>th</sup> March 2018 the trial court found that the prosecution had established a prima facie case and placed the appellant on his defence. **The appellant was the sole witness in his defence.** He testified that the case was a fabrication since he had worked for the complainant's mother Pw3 for one year and she has declined to pay her wages.

16. The trial court found his to be identification by recognition, and so the appellant was properly identified. The trial court also found the defence by the appellant to be a red herring since it does not explain the incentive for the malicious prosecution by the complainant, or by the other independent witnesses to wit, the complainant's sister, the clinical officer and the investigating officer, or anything which show these witnesses were part of a scheme to fix him. But, what does the evidence portend?

#### **Elements of crime**

17. The appellant herein was charged with the offence of defilement contrary to **section 8(1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006** and 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**. The trial court convicted him of defilement and discharged the alternative charge. In defilement, three elements are to be proved, to wit: (1) the age of the child; (2) there was penetration; and (3) the appellant committed the penetration.

18. I do note the age of the minor was not in dispute. The P3 report gave the age of the minor to be 6 years. Pw3 testified that Pw1 was born on 27/10/2014; this was corroborated by Pw1 who stated that she was aged 6 years and a class 1 student.

19. Penetration and the perpetrator thereof is the crux of this appeal. It is the appellant submissions that the treatment notes and the P3 form do not show there was any penetration of the victim. I note that the P3 form noted that there was un-penetrating defilement. This was supported the by the evidence of the medical officer who noted that the complainant had sustained non preventive defilement. They arrived at their conclusions due to the presence of spermatozoa and pus cells in the complainant's vagina.

20. **Section 2 of the Sexual Offences Act** defines penetration as follows;

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

21. The law on penetration is carefully cast for partial insertion of the genital organs of a person into the genitalia of the other person is sufficient for purposes of the offence defilement. The insertion need not be deep in order to be penetration in the sense of the law. Therefore,

fact that the hymen had not been broken does not in itself imply that there was no penetration of the victim. This matter was discussed and settled in **Erick Onyango Ondeng V. Republic CRA No. 5 of 2013 (2014) eKLR** where the Court of Appeal stated as follows:-

**“We do not share the Appellant’s suggestion that Dr. Muhombe’s report concluded that there was no hymen whilst that of Dr. Kamau concluded that the hymen was intact. Dr. Muhombe’s report was that the hymen had some old tears on the lateral and anterior side, suggesting that it was still there. We agree with the first appellate Court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence. In TWEHANGANE ALFRED VS UGANDA (supra) the Uganda Court of Appeal expressed the same view as follow:**

**“In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”**

22. The evidence of Pw4 was that she found the complainant hoisted in the air by the accused person in a sexual act. Again, the presence of spermatozoa and pus cells in the complainant’s genital organs is proof of penetration. Hence, I do find that the trial magistrate did not err in arriving at his determination that there was penetration.

23. Was the appellant the perpetrator? As part of determination of this element, let me tackle the **second ground of appeal** which implies that the trial magistrate erred by failing to note that the prosecution evidence was full of contradiction. On contradiction, I am content to cite **Njuki & 4 others versus Republic [2002] 1KLR771 at page 782 pr. 15-25** where it was stated:-

**“...But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused.”**

24. I have considered the testimony of Pw1 and that of Pw4. I do note that the evidence of Pw1 was to the effect that the offence occurred at 7:30 in the morning. That was not the same evidence presented by Pw3 Pw4 and Pw5. They all stated that the offence occurred at 17:30 Hrs. This evidence was consistent with the medical report which places the time of the occurrence of the offence at 17:30 hrs. Pw5 also presented evidence as to the arrest of the accused person and placed the occurrence of the offence at 17:30 Hrs. The court takes note of the fact that Pw1 was a minor who may not be expected to be accurate on time. I also do note that the victim who is a minor talked of 7.30 in the morning whilst the doctors and the investigating officer adopted 24-hour module and stated 17:30 hrs. This may cause confusion to a witness especially a minor. There is also the element of passage of time which ordinarily affects people’s ability to recollect the minutest details of an incident in exactly the way they perceived them at the time the incident occurred. In **Philip Nzaka Watu v. Republic [2016] eKLR** it was stated:

**“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.**

25. The evidence of Pw3, Pw4 and Pw5 was consistent and was supported by the recording in the treatment notes and the P3 form. When I take all factors into consideration, I do find that the contradiction cited by the appellant does not affect the core of the evidence by Pw1 and all other witnesses by the prosecution. This discrepancy is a trivial one which does not create any doubt as to the occurrence of the incident. I dismiss the ground.

26. Another ground that was raised by the accused person in his submission was to the procedure taken by the trial court in taking the evidence of Pw1 as it was not recorded whether she gave sworn or unsworn evidence. **Section 19 (1) of the Oaths and Statutory Declarations Act** provides as follows:

**“Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth”.**

27. In **Samuel Warui Karimi v Republic [2016] eKLR** the Court of Appeal explained the need for the conduct of *voire dire* in the following terms;

**“In our own understanding of the above provisions of the law *voire dire* is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus under the Evidence Act, the test is one of competency as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. It, therefore, follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence.”**

28. The record shows that the trial court conducted a *voire dire* before taking the evidence of Pw1. The court was satisfied in the examination

and proceeded to take her evidence. Once competence of the minor witness is established, her evidence will be taken. Such evidence may be sworn or unsworn but in each case the witness is subject to cross-examination. The due procedure was therefore adhered to.

29. Having stated the foregoing, PW1 narrated how, on the material day, the appellant called her from the house for he had something to tell her. She went out and the appellant got hold of her and removed her clothes and his too. She told the court that W and K came out and saw what the appellant was doing and so he released her and ran away. **Pw4 WK**, a minor aged 16 years, testified that she was at home together with her siblings on the material date. That at around 7:30 p.m. K alerted her that the appellant was doing something to Pw1. That she went outside and found the appellant had removed his clothes to the knee level, he had also removed Pw1's skirt and had hoisted her to the waist level having sex with her. PW1 and PW4 knew the appellant. They identified him by recognition as the person who sexually assaulted PW1. The mother of PW1 and the IO further corroborated these pieces of evidence. The medical evidence of penetration also adds support on penetration. His defence that this case is a fabrication is merely an afterthought as I do not see anything which points at mischief in the prosecution of the appellant. Be that as it may, it is not strange however that some malicious persons have used sexual offences to have their nemesis locked up in prison. Therefore, when such claim is made, care should be taken to evaluate it meticulously- but of course on evidence- in order to avoid sending an innocent person to jail. But, as I have stated, in this case I do not find anything to show the charges were trumped-up against the appellant. I dismiss the defence. Accordingly, I find that the appellant is the one who penetrated the victim herein. Consequently, the appeal on conviction fails.

#### **Of sentence**

30. The **third and last ground of appeal** relates to the sentence imposed. **Section 8 of the Sexual Offences Act** Provides as follows;

**8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

**(2) 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.**

31. The trial court was alive to the thinking of the Supreme Court in **Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR** and sentenced the appellant herein to serve thirty years' imprisonment. I have considered the evidence on record and the circumstances of the case. In mitigation the appellant only stated that he has an ailing mother and his father had died. The appellant did not express any remorse for the physical pain and damage he caused to the victim, during and after committing the offence. I therefore do find that the sentence imposed was justified in the circumstances and I wish not to disturb the discretion of the trial court thereto.

32. In the upshot, I do find that the appeal herein lacks merit and is hereby dismissed.

**Dated, signed and delivered at Milimani Nairobi this 21<sup>ST</sup> day of APRIL 2020**

**F. GIKONYO**

**JUDGE**

**Representation**

**1. Appellant acting in person**

**2. DPP Meru for state**

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