



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRA NO. 40 OF 2018**

**BARNABAS ACHOLA BIRA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court at Maseno (Hon. C. N. Oruo RM) dated the 15<sup>th</sup> February 2018 in Maseno SPMCCRC No. 1972 of 2015]**

**JUDGMENT**

The Appellant, **BARNABAS ACHOLA BIRA**, was convicted for the offence of **Defilement** Contrary to **Section 8 (1) (2)** of the **Sexual Offences Act**. He was then sentenced to Life Imprisonment.

1. In his appeal he has submitted that the conviction was unsound because the age of the victim was never ascertained as required by law.
2. He also submitted that the evidence adduced by the prosecution was so contradictory that it cannot sustain a conviction. When canvassing the appeal he pointed out that whilst the victim testified that she did not know the name of her assailant, the father of the victim said that she had named the assailant. Meanwhile, the mother of the victim made reference to "*Baba Mzee*".
3. On the question of penetration, the Appellant submitted that the evidence adduced did not provide proof. He submitted that the Post Rape Care (PRC) Form was silent on the issue as to whether or not the hymen was intact, whilst the doctor testified that the hymen was not freshly torn.
4. If the victim was examined within a day of the alleged defilement, the Appellant expressed the view that the tear to the victim's hymen ought to have been fresh.

**RIGHTS OF THE ACCUSED**

5. The Appellant submitted that his constitutional rights had been violated. In particular, he said that the prosecution failed to provide him with the Witness Statements prior to the commencement of the case.
6. Therefore, he submitted that that omission occasioned a miscarriage of justice.
7. Secondly, the Appellant faulted the trial court for failing to ensure that it got a report on his complaint regarding his difficulty in hearing.
8. The trial court is faulted for ignoring the Appellant's physical health challenges, when it proceeded to sentence him to life imprisonment. In the opinion of the Appellant, the said sentence was manifestly harsh, in the prevailing circumstances.
9. The Appellant submitted that his circumstances were exceptional, and that therefore, the sentence ought to be reduced.
10. In answer to the appeal, learned State Counsel, Ms Maurine Odumba submitted that the conviction and sentence were well-founded.
11. The Respondent said that the age of the victim was proved through the child's "*Prayer Card*", coupled with the information noted on the Post Rape Care (PRC) Form, the Treatment Notes and the P3 Form.
12. On the question as to the identity of the perpetrator, the Respondent submitted that this was a case of recognition.

13. In any event, the incident took place in broad daylight, and the victim spent a considerable length of time with her assailant.
14. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions.
15. Whilst undertaking the process of re-evaluation of the evidence, I will bear in mind the fact that I did not have the advantage of seeing any of the witnesses when they were giving evidence.
16. The Appellant was said to have committed the offence on 11<sup>th</sup> November 2015: that is what is specified in the Charge Sheet.
17. The plea was taken on 16<sup>th</sup> November 2015, and the case was then set down for hearing on 8<sup>th</sup> December 2015.
18. However, on 8<sup>th</sup> December 2015 the Appellant told the court that he was not ready to proceed with the trial, because he did not know what he was accused of.
19. The learned trial magistrate directed that the trial ought to proceed, because the Appellant had given no good reason that could stand in the path of the trial.
20. The Appellant told this court that he had tried his best to get Witness Statements before the trial could start; but he blamed the trial court for ignoring his pleas.
21. I have carefully looked at the record of proceedings on 8<sup>th</sup> December 2015. There is absolutely no request made by the Appellant, for the Witness Statements. On that date he only said that he did not know what he was accused of.
22. In my considered view, the trial court could not have known that the Appellant had not received Witness Statements, when the Appellant did not inform the court about that fact.
23. I note that on 16<sup>th</sup> November 2015, the trial court had directed that the Appellant should be provided with Witness Statements and all other documents which the prosecution intended to rely on. Therefore, when the Appellant failed to notify the court that he had not yet been provided with the Witness Statements, there was no way the court could know that its order had not yet been complied with.
24. In any event, it was not until 14<sup>th</sup> November 2016 that the trial commenced.
25. And before the commencement of the trial, the Appellant expressly informed the trial court that he was ready.
26. In the circumstances, there is no merit in the Appellant's contention, that the trial started before he was provided with Witness Statements.
27. On 29<sup>th</sup> April 2016 the Appellant told the court that he required medical attention, due to the fact that he was losing his ability to hear.
28. The court ordered that the Appellant be accorded medical attention; and the trial was put-off to a later date.
29. On 18<sup>th</sup> May 2016, the Appellant repeated his request for medical attention. The learned trial magistrate noted that the issue was pertinent, as the Appellant had a right to hear and to understand the proceedings.
30. In the circumstances, the court directed that the Appellant be accorded medical attention, so that an expert could ascertain the hearing quality that the Appellant had.
31. Although the court directed that a Report on the Appellant's hearing capability be filed in court, there is nothing in the court records to show that any report was ever filed.
32. I am satisfied that the trial court displayed appropriate care and attention for the wellness of the Appellant, as seen in the orders requiring the Appellant to be given appropriate medical attention.
33. As I pointed out earlier, the Appellant told the court, on 14<sup>th</sup> November 2016, that he was ready.
34. Notwithstanding that pronouncement by the Appellant, about being ready, the court directed that the proceedings be conducted in loud voices, so as to ensure that the Appellant was able to follow the proceedings.
35. **PW1** was the Complainant. She testified that the Appellant inserted his "dudu" into her dudu. When she was asked where her "dudu" was, **PW1** pointed at her private parts.
36. **PW2** is the mother of the Complainant. She testified that on the material date, the Complainant informed her that she had been defiled by Baba Mzee.
37. **PW3** testified that the Complainant informed him that she had been defiled by the Appellant. According to **PW3**, the name given by the

Complainant, as that of the person who had defiled her is Barnabas.

38. **PW4** is the Assistant Chief of Kayila Sub-location. On the material day **PW3** informed him that the Complainant had been defiled by Barnabas Ochola.

39. Relying on that information, **PW4** caused the arrest of the Appellant.

40. **PW5** was a Clinical Officer at Kombewa County Hospital, where the Complainant was examined, after **PW3** had escorted her to that facility.

41. **PW5** found lacerations on both labia of the Complainant.

42. He testified that the hymen was not freshly torn.

43. **PW5** produced the PRC Form, the P3 Form and the Treatment Notes for the Complainant.

44. In the PRC Form, the following comments were recorded under the portion headed;

***“Genital Examination of the Survivor”;***

***“Suspected STI 2 to repeated defilement.”***

45. On the same PRC Form the additional information provided by the client were as follows;

***“Child reported that this was the second abuse.”***

46. To my mind, that information explains why the Clinical Officer noted that the hymen tear was not fresh.

47. **PW6** was the Investigating Officer. She testified that the Appellant lured the Complainant to his house, by promising to give her some mandazi.

48. When the child was taken to hospital, the Clinical Officer is said to have confirmed that the child had been defiled severally.

49. In effect, the evidence of **PW6** corroborated the evidence of the Clinical Officer.

50. I find that penetration was proved, beyond any reasonable doubt.

51. The age of the Complainant was stated by both her parents. And there was a document called *“Hati ya Kuombea Watoto”* which was attached to the Treatment Notes from the Kombewa County Hospital. It does appear that the said Form was issued by the Pentecostal Assemblies of God, Nyanza Region.

52. The Form bears the date of birth, for the Complainant, as 3<sup>rd</sup> May 2007.

53. To my mind, that document could be deemed as constituting proof of the age of the Complainant.

54. On the other hand, I find that the age inserted on the Treatment Notes or the PRC Form or the P3 Form, is not, of itself proof of the age of the Complainant. I so hold because the information on those documents would, normally, have been provided by either the Complainant or the person who escorted her to the hospital or to the police station.

55. The say-so of the Complainant or of the person who provided that information is not proof of itself.

56. If the person conducting medical examination of the Complainant, confirms that he also assessed the age of the Complainant, the report of such an assessment could be proof of age.

57. In this case I have perused the record of the proceedings very carefully, but I failed to trace any information concerning the *“Hati ya Kuombea Watoto.”*

58. Neither of the Complainant’s parents said that the document was procured by them.

59. None of the witnesses explained how the document got attached to the Treatment Notes.

60. The Clinical Officer could not have procured the document from its maker, because it does appear that it was not until the Complainant had been sexually molested that the Clinical Officer first came into contact with her.

61. Accordingly, I find that the legitimacy of the “*Hati ya Kuombea Watoto*” was never established by the prosecution.
62. I also find that the prosecution left a number of loose-ends in the evidence they tendered concerning the identity of the Appellant.
63. The Complainant made it clear that she did not know the name of the person who assaulted her. Therefore, it is not clear how the Complainant would then have given the Appellant’s name to her father.
64. Meanwhile, the mother of the Complainant talked about “*Baba Mzee*”. No effort was made to explain the nexus, if any, between the Appellant and “*Baba Mzee*.”
65. Finally, it is noted that the Complainant made the following statements, during the voire dire examination;
- “I have come with my mother and father. They have told me what to say. I will say what my mother told me to say. I don’t know the difference between lying and stating the truth.”***
66. In the light of those statements, I find that it cannot be ascertained whether or not the testimony of the Complainant was about what had actually happened or if the same was basically what her mother had told her to say.
67. Once it was not possible to verify the truthfulness of the testimony of the Complainant, it cannot be said that evidence tendered thereafter had corroborated her testimony.
68. In his defence, the Appellant said that he did not commit the offence.
69. Ordinarily, that would be deemed as a bare denial.
70. But in the light of my re-evaluation of the totality of the evidence adduced by the prosecution, I find that there was a real possibility that the defence advanced in this case, probably provided a full answer to the case which had been mounted against the Appellant.
71. Accordingly, I find merit in the appeal against the conviction.
72. If I had upheld the conviction, I would not have disturbed the sentence. I say so because the fact that the Appellant had an ear ailment, which made it difficult for him to hear, does not constitute a reason to warrant a reduction of a sentence that was otherwise lawful.
73. In the result, the appeal is allowed; and the conviction is set aside. I order that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 6TH DAY OF MAY 2020**

**FRED A. OCHIENG**

**JUDGE**