



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NUMBER 53 OF 2019

REMMY WANYONYI WANJOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the judgment of D. O Onyango (Chief Magistrate) (Kimilili) Judgment delivered on 10th May, 2019)

J U D G M E N T

The appellant **Remmy Wanyonyi Wanjoki** was charged with the offence of defilement contrary to Section 8(1) (3) of the Sexual offences Act No. 3 of 2006. The particulars of the offence are: -

Count I: Defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006 REMMY WANYONYI WANJOKI: On 6th day of December, 2017 at Bungoma Country, intentionally and unlawfully caused his penis to penetrate the vagina of LNW a child aged 12 years.

Alternate Charge: Committing an indecent Act with a Child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006

REMMY WANYONYI WANJOKI: On the 6th day of December, 2017 at Bungoma Country, intentionally touched the vagina of LNW a child aged 12 years with his penis.

He was tried, convicted and sentenced to Twenty Five Years imprisonment. Aggrieved by the conviction and sentence, he preferred this appeal on the following grounds: -

- i) That, the trial court failed to consider my defence and therefore beaching section 169(1) of the Criminal Procedure Code.***
- ii) That, the learned trial court erred in law and fact when he convicted me without considering that prosecution failed to examine me in order to prove the truth.***
- iii) That, the trial court failed to give me fair trial as stipulated in the constitution of Kenya 2010 Article 50 No. 2.***

The evidence before the trial court was that on 6th December, 2017 **PW 1 LNW Agiri** aged 12 years and a pupil [*particulars withheld*] Primary School in standard 6 was with other children at [*particulars withheld*] where they had gone to collect firewood. While there the accused who was armed with a panga pulled her from the river. He led her to sugarcane plantation. While inside the plantation he tore her black tight. He then inserted his penis which she called "*a thing he uses to urinate*" into her vagina. He then ordered her to leave and not tell anybody. She came out and informed her friends. They went and informed her grandmother who took her to Kimilili Hospital where she was treated, examined, and discharged.

Pw 2 SWN also aged 13 years who was with the complainant testified how accused ambushed them and took complaint to the sugarcane plantation. When she came back she was crying and told them she had been defiled.

PW 4 Catherine Akiru, a Clinical Officer at Kimilili Hospital examined the complainant and found that the hymen was missing, had no bruises or discharge but had epithelial cells an indication of an infection.

PW 5 Pius Ndagwe Situma examined the complainant and assessed her age to be 12 years old.

The Appellant in his sworn statement of defence testified that on material date he was taking care of his cattle when he heard children talking in the sugarcane plantation. He demanded to know what they were doing in the sugarcane planation. They all ran away. On 9th December, 2017 he was arrested on allegation of defilement. In cross-examination, he admitted he knew the complainant. It is upon his evidence that the appellant was found guilty and convicted.

The appellant filed written submissions in support of this appeal. He submitted that the trial court did not consider his alibi defence. He submitted that PW 2 S was not an eye witness to the defilement and that both her and the complainant framed the charges because appellant chased them form the sugarcane plantation where they were stealing cane. The appellant further, submitted that the trial court erred in relying on the evidence of **PW 4 Catherine Akiru**, a Clinical Officer because it is not possible that the complaint who was defiled and examined the same day would not have any bruises or discharge. This, the appellant submits shows that there was no penetration.

M/s Nyakibia for the state opposed the appeal. She submitted that the age of the complainant was established to be 12 years by the age assessment report exhibit 2. Counsel further submitted that penetration was proved by evidence of the complainant and examination of the Clinical officer. She submits that the appellant was properly identified as he is known to the complainant. Lastly, she submitted that the witnesses corroborated the evidence of the complainant. She, therefore, submits that all the element of defilement were proved. On sentence, she said there were aggravating circumstances and the sentence of 25 years imprisonment was appropriate.

The accused was charged and convicted of the offence of defilement Contrary to Section 8 of the Penal Code.

Section 8(1) as read with Section 8(3) provides: -

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

8 (3) 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 ingredients of the offence of defilement which the prosecution must prove beyond reasonable doubt are

- a) The age of the complaint,***
- b) There was penetration.***
- c) That it is that accused who did the act of penetration***

On age, **PW 4** examined the complaint and produced an age assessment report which shows the complainant was 12 years old. It is now settled that the age of complainant can be proved by production of birth certificate, birth notification card, baptismal card. Age can also be ascertained by direct evidence of the complainant and/or parents or guardian who have information on date of birth of complainant. The age can also be ascertained by evidence of examination and age assessment by a medical practitioner. In this case, the complainant testified that she was 12 years old and the age assessment report confirmed the same.

The other element of defilement is the positive identification of person who committed the act of penetration. Positive identification is crucial because guilt is attached to a person and punishment meted out to the person found guilty. In this case the complainant testified that she knew the appellant. Indeed the appellant in cross-examination admitted knowing the complainant and meeting her at the sugar plantation, where he asked them what they were doing at the plantation and they ran away. The issue of identification was, therefore properly proved.

The other element whether the prosecutor had to prove was whether there was penetration. Penetration is defined in Section 2 of the Sexual Offences Act as: -

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

The evidence of the complainant on this aspect during the trial was.

“I recall on 6th December, 2017 at 11 a.m. S and E were collecting firewood in K. I saw Remmy cross a bridge to where we were. He had a panga. He jumped in water. He pulled me form the river and escorted me to sugarcane plantation. He tore my petticoat, I had blouse, skirt and black tight.

He threatened that if I screamed he would cut me using a panga. He told me to behave like his wife. He tore the tight. He touched my private parts using his hands. He inserted this thing he uses to urinate into my vagina. He ordered me to leave the scene and that if I reported to anybody he will kill me. I left the scene crying.”

The complainant reported to AW her grandmother who testified: -

“I recall on 6th December, 2017 at 1 p.m. I went to Malaba. At around 2 p.m. I was called and told L had been defiled. I rushed back home to where L was, arriving at 5.30 p.m. I talked to Lydia and she told me she was defiled by a man. I examined her genitalia and saw sperm like substance.

I rushed L to Kimilili Hospital where she was examined and treated. She was given drugs to take for 38 days. I went back to Kimilili Police Station. The next day L and the girl was with recorded statements. She was issued with a P3 Form.”

The trial magistrate on whether there was penetration stated: -

“I find that the prosecution have proved beyond reasonable doubt that the accused on the 6th December, 2017 intentionally and unlawfully caused his penis to penetrate the vagina of PW 1, a child aged 12 years.”

In Sexual Offences, penetration can be proved by the evidence of the complainant and/or supported by the evidence of Medical examination. The clinical officer who examined the complainant stated: -

“When I examined her genitalia, hymen was missing. There were no bruises or discharge. We tested for HIV, VDL and all were negative. The urine had epithelial cells and indication that there was infection. We gave her drugs to prevent HIV infection. I concluded that she was defiled. I wish to produce the P3 form as exhibit.”

From the evidence of the Clinical Officer, the complainant upon examination did not have any bruises in her genitalia, no discharge. The urine had epithelial cells and the hymen was missing. Her conclusion was that there was defilement. If there was no bruises, hymen is not shown to be freshly broken but was missing, there was no discharge, what was the basis of the conclusion of defilement? It is most probably from the history of the patient. It is instructive to note that the examination was done on the same day of the incident as the complainant was taken to hospital the same day. Even the discharge **PW 3 AW** testified that she saw when examining the complainant genitalia which she showed was like sperm like substance was not seen by the doctor.

A Doctor’s medical opinion must flow from the examination findings. In this case I am satisfied that the opinion is not supported by the finding of examination but by history narrated by the complainant.

The medical examination having not established the complainant was defiled the only other evidence of defilement was that of the complainant herself. Her evidence on this aspect was: -

“I recall on 6th December, 2017 at 11 a.m. S and E were collecting firewood in K. I saw Remmy cross a bridge to where we were. He had a panga. He jumped in water. He pulled me from the river and escorted me to sugarcane plantation. He tore my petticoat, I had blouse, skirt and black tight.

He threatened that if I screamed he would cut me using a panga. He told me to behave like his wife. He tore the tight. He touched my private parts using his hands. He inserted this thing he uses to urinate into my vagina. He ordered me to leave the scene and that if I reported to anybody he will kill me. I left the scene crying.”

The provision for Section 124 of the Evidence Act, allows the trial court to convict on the evidence of the victim of a sexual offence. However, before the trial court can do so. It must first believe or be satisfied that the victim is telling the truth and it must also record the reasons for that belief. The trial magistrate in his judgment states: -

“On whether she was defiled, the most crucial evidence is from PW 1, a minor aged around 12 years. I have warned myself on the danger of relying on the uncorroborated evidence of a minor.

I watched both PW 1 and PW 2 testify. They were categorical that the accused threatened them with a panga before leading PW 1 into nearby sugarcane plantation. As to what happened inside the sugarcane plantation, PW 1 narrated with clarity how the accused tore her petticoat and defiled her.”

In **Arthur Mshilla Manga Vs R (2016) eKLR** the Court of Appeal stated that: -

“But did the medical evidence on record establish that JM was defiled? We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3. No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the P3 form as PEXI”

The Court proceeded and stated that:

“From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the Evidence Act, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra)). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.”

The complainant contends that the Appellant inserted his thing he uses to urinate, meaning penis into her vagina. The grandmother who

allegedly examined the genitalia after complainant reported to her said she saw a discharge like of spermatozoa. An examination by the clinical officer on the same day did not find any discharge or bruises but the hymen was missing. There was no evidence that the hymen was torn freshly as to indicate that it was a result of the penetration by appellant. There was no evidence therefore, that the hymen missing was related to the event of the same day, because if it were so, the clinical officer would have noted.

The appellant's defence was that it is true he met complainant and others in a sugarcane plantation and they ran away, he did not defile the complainant. The complainant testified that she saw the appellant and jumped into the river which confirms the appellant contention. Had the trial magistrate properly addressed his mind to these circumstances, he would have found that penetration was not proved beyond reasonable doubt.

When the prosecution does not prove all the ingredients of an offence, it follows they have not proved the charge against the accused beyond reasonable doubt. In this appeal, I find the prosecution I did not prove the charge beyond reasonable doubt.

I, therefore, allow the appeal, quash the conviction and set aside the sentence of Twenty Five years Imprisonment imposed. The appellant **Remy Wanyonyi Wanjoki** to be set at liberty unless otherwise lawfully detained.

Dated, signed and delivered at Bungoma this 7th day of May 2020

R N RIECHI

JUDGE