



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 19 OF 2019**

**SAMUEL MUCHERU.....APPELLANT**

**VERSUS**

**REPUBLIC.....STATE**

***Being an appeal from the Judgment of Honourable Y.I. Khatambi – Senior Resident Magistrate,***

***delivered on 28th February, 2019 in Nakuru Chief Magistrate’s Court Criminal Case No. 19 of 2018)***

**JUDGMENT**

1. The Appellant herein, Samuel Mucheru, was arraigned before the Nakuru Chief Magistrate’s Court charged with a single count of defilement contrary to section to Section 8(1) as read with Section 8(2) of the Sexual Offence Act No. 3 of 2006. The particulars of the charge he faced stated that on the 29th day of January, 2018, at [Particulars withheld] area in Nakuru, the Appellant intentionally caused his penis to penetrate the vagina of MM, a child aged 7 years.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars as to date, place and victim of the alternative charge are the same as that in the main charge.

3. The Appellant pleaded not guilty and the case proceeded to full hearing. The Prosecution called four substantive witnesses and closed its case. The Learned Trial Magistrate ruled that the Appellant had a case to answer and put him on his defence. The Appellant gave a sworn statement and called two witnesses. The Learned Trial Magistrate was persuaded that a case had been made out beyond reasonable doubt and returned a guilty verdict. She then proceeded to sentence the Appellant to imprisonment for life.

4. The Appellant is aggrieved by both the conviction and sentence. Through his lawyers, Rubua Ngure & Co. Advocates, the Appellant filed a Petition of Appeal enumerating the following grounds:

*1) That the Learned Trial Magistrate erred in law and in fact in convicting the Appellant when the evidence on record was manifestly insufficient, inconsistent and had glaring gaps hence incapable of sustaining a conviction.*

*2) That the Learned Trial Magistrate erred in law and in fact in convicting the Appellant against the weight of evidence on record.*

*3) That the Learned Trial Magistrate erred in law and in fact in failing to give due and/or adequate consideration to the Appellant’s defence.*

*4) That the Learned Trial Magistrate erred in law and in fact in holding that the Prosecution had proved its case beyond reasonable doubts when the Prosecution had not done so.*

*5) That the Learned Trial Magistrate erred in law and in fact by passing a sentence that was manifestly excessive in the circumstances, in any event.*

5. As a first appellate Court, the Court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it neither saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190***.

6. The evidence that emerged from the trial was as follows.

7. The Complainant testified as PW1 after the Learned Trial Magistrate formed the opinion, after conducting voir dire, that she understood

the nature and meaning of oath. She testified that on 29/01/2018 she left school at 1:00pm to go home. Although usually she walked home with her friends M, A and M, on that day, her friends left her behind and she had to walk home alone. As she was heading home, she said, a man she did not know beckoned her. She said she went to where the man stood. She said that the man got hold of her hands and forcefully took her to a house downhill. It was a small house, she said. Later she said that it was made of carton and sticks. The man, the Complainant testified, removed her clothes and her panties. He then undressed. He lay on top of her and inserted his "dudu" into her. She felt pain, she said, but she did not scream because the man held her mouth. After he was done, he asked her to leave the house. She left and went home.

8. The Complainant said that she did not tell anyone what had happened. The following Monday, she was, again going home from school when the mysterious man re-appeared on the way. Again, she was alone. Again, the Complainant forcefully got hold of her hands and pulled her all the way to his house. Along the way, she fell and hurt her knees, she said.

9. This time, the Complainant said, the man did not take her into his house. Instead, he took her behind some tanks near the house and defiled her again. This time, the Complainant said, the man did not cover her mouth; and neither did she scream. However, the Complainant said that the man warned her that if she told anyone what had happened, he would throw her to the dogs. The Complainant said that she then went home.

10. The Complainant testified that when she went home on this Monday, their neighbour told her mother that she had been late to get home. She said that her mother threatened to punish her and that is when she confessed that she was with another man. She said that one day as she was walking with her mother to show her where the man took her, she saw the man who had defiled her coming down the hill. She said that she was scared but upon the nudging of her mother who admonished to tell the truth, she identified the man to her mother. That man is the Appellant.

11. The Complainant's mother, LA, testified as PW2. She testified that on 29/01/2018, the Complainant went to school but was late to come back. She said that she was told by a neighbour that the Complainant had come home at around 5:30pm. Upon inquiry, LA said that the Complainant at first told her that she had tuition in school. She then changed her story and said that she was washing the class. LA said that she later threatened to punish the Complainant with a cane but she did not divulge any information at first. However, she noticed that the Complainant was shivering. She ordered her to get on the bed and upon inspection of her private parts, she noted a white, mucus-like discharge. LA called a friend who confirmed that the Complainant had been defiled.

12. LA said that she asked the Complainant was responsible but that at first she lied that it was a Standard 2 pupil. She then changed her story and said that it was a Standard 4 pupil. She later changed the version again and said it was a pupil from another school. Finally, LA said that the Complainant said that it was a person who had dreadlocks; and that it was a short man.

13. LA testified that she went with the Complainant towards the tanks in Hyrax. They saw the Appellant coming down the hill. The Complainant stiffened prompting LA to ask if the man they had just met was the assailant. The Complainant said he was and LA immediately raised alarm and held on to the Appellant's hands.

Members of the public congregated and arrested the Appellant.

14. The Appellant was then escorted to Bondeni Police Base where Corporal Veronica Wanjiru of Bondeni Police Station re-arrested her. Corporal Wanjiru became the Investigating Officer in the case. She testified as the final witness. She recorded statements and gave a P3 Form LA and referred them to Nairobi Women's Hospital. She testified that she visited the scene – the house where the Complainant said she had been defiled. She said that, however, she did not find any neighbours there. She did not independently verify that it was, indeed, the Appellant's house.

15. At Nairobi Women's Hospital, the Complainant was examined by Dr. Elijah Collins on 30/01/2018. Dr. Collins testified as the third witness. He said that upon examination of the Complainant, he found that her vagina was inflamed at the 3 o'clock position. He also found an old broken hymen. He said that he did not do a high vagina swab because the Complainant is a young child. Urinalysis showed presence of pus cells. The doctor concluded that the Complainant had been defiled.

16. Initially, the Appellant was not represented. After the testimony of the Complainant and her mother, Mr. Rubua Ngure came on record for him and successfully applied to recall the two for further cross-examination.

17. Upon further cross-examination, the Complainant said that on the day she was defiled, she left school at 4:00pm and that she was left behind by the other children because she had forgotten her sweater in school and went back for it. Asked what happened, she replied:

*A man with rasta came pulled my hand. I fell and got hurt. My thumb and index finger got hurt. He pulled me....I got home home, it was getting dark then. I did not find anyone. I showered myself in the evening. On the said day, I showered. I then saw my mother. She did not ask anything. After a while, she asked where I was. I kept quiet. I went to school on Monday. She inquired where I was. I did not answer. She took teacher's cane and beat me up. I was forced to say the truth. Mum told me to take her to the tanks. I did. As we walked away, I saw the person who defiled me.....*

18. She later on said that when the Appellant met her at the roadside, he covered her mouth so that she could not scream. Further that there were people around who were tilling land but that no one saw the Appellant abducting her. She conceded that she had also been defiled by two boys from St. John whose names she did not know but that they live in Carribean. Then she said this: "Mum told me if I do not identify my assailant or she would beat me up. I identified rasta. I showed rasta then told mum."

19. When the Complainant's mother was further cross-examined, she insisted that she had beaten the Complainant on Monday night at home and that she never beat or threatened her in School on Monday.

20. In his defence, the Appellant testified that he is a hawkler who sells toys at the town stage in Nakuru. He said that he goes to work every day at 8:00 am and does not usually return home until 6:00pm. He said that he usually keeps his goods at Gitonga's shop overnight and picks them up the following morning. He said that on 29/01/2018, he was at work in town as usual and that he did not defile the Complainant.

21. The Appellant testified that he is a tenant at Samuel Mwangi's plot where he pays Kshs. 1,500/- in rent. He produced three receipts as proof. He denied that he lived in the place described by the Complainant.

22. The Appellant's landlord, Samuel Mwangi, testified as a Defence Witness and confirmed that the Appellant was his tenant in Kiratina where he pays rent of Kshs. 1,700/- which had been increased from Kshs. 1,500/-. He had a duplicate receipt book which showed the payments made by the Appellant.

23. Mr. Cornelius Gitonga is the owner of the Kiosk where the Appellant claimed he kept his goods overnight. He confirmed that the Appellant kept his wares at this Kiosk and that on 29/01/2018 he saw him at 1:00pm when he collected his wares and returned them at 6:30pm. He, however, conceded that he would not know where the Appellant went after collected his wares.

24. The Learned Trial Magistrate correctly identified the three elements which needed to be proved beyond reasonable doubt before returning a guilty verdict:

a. Age of the victim;

b. Penetration; and

c. Positive identification of the Accused Person as the person who caused the penetration.

25. Having concluded that neither the age nor the fact of penetration was really at issue, the case turned on whether enough evidence was adduced to show beyond reasonable doubt that it was the Appellant who caused the penetration. On this point, the Learned Trial Magistrate analyzed the evidence thus:

*Having carefully analyzed the evidence on record, I note that the Complainant testified that she was defiled on two occasions – on Friday and Monday the following week. The Accused Person is said to have walked past the Complainant and her mother as they walked up the hill towards the tanks where the offence was allegedly committed. I wish to point out that the Accused walked past the Complainant and the mother a day after the incident. Considering the time that had lapsed, I am of the considered view that the issue of mistaken identity does not arise. I make this observation based on the fact that offence took place during the day, there was adequate lighting for positive identification of the assailant. The Complainant identified her assailant as "marasta". The Complainant remained consistent in her exam in chief and cross examination...*

26. In short, the Learned Trial Magistrate believed the Complainant's narrative and expressly disbelieved the Appellant's version. She said the Appellant's version does not cast doubt on the Prosecution case because she found the Complainant truthful and was able to recount the events in a chronological manner.

27. Upon re-evaluation of the evidence tendered in the case, I am less enthusiastic about the quality of the evidence adduced in the case and its ability to push the case beyond reasonable doubt threshold. I say so for at least six reasons based on a keen analysis of the evidence.

28. *First*, on both days when the defilement occurred, there appears to be un-explained time differences. On some occasions, the Complainant said she left school at 1:30pm; in others at 4:00pm. This is important because by the narrative of the Complainant, the assault took an extremely short period of time which would not explain the 3 plus hours between when the Complainant was supposed to arrive at home and when she actually did on both days.

29. *Second*, the description and identification of the assailant in this case does not inspire much confidence that the Appellant was, indubitably, the assailant. When the Complainant's mother learnt that her child had been defiled, rather than report the matter to the Police and have her child describe the assailant, she claimed she did own investigative work. She beat and/or threatened the child, and went with her to the scene of the alleged defilement and upon further threats, the Complainant pointed out the Appellant as the person who had allegedly defiled her. The way this unfolded, therefore, left no description or earlier report of the assault seriously weakening the evidence of identification given by the Complainant. Additionally, it seemed curious that throughout the trial, the Complainant kept referring to the person who defiled her as "a rasta"; not "you" or "the accused".

30. *Third*, though the Learned Trial Magistrate said the Prosecution narrative was consistent, there were in fact some contradictions that raise not insignificant concerns seen together. In particular, there are questions whether on the Monday night the Complainant told the mother that she had been defiled by a "rasta". The mother claimed she said that; the Complainant did not. Also, there are questions whether the Complainant's mother went to the Complainant's school on the Tuesday and beat up the Complainant and then walked with her towards the scene as she threatened to beat her up again if she does not show her who the assailant was. Lastly, the Complainant seemed to change her story on what exactly happened on the first encounter: did the assailant cover her mouth on the street and walked with her with her mouth covered for the ten-plus minutes to the place where the defilement allegedly took place in broad daylight as she claimed during cross examination?

31. *Fourth*, the Prosecution narrative left open whether the Complainant had, in fact, been defiled by some other person(s). Both to her mother and in her cross-examination, the Complainant conceded that she had been defiled by some boys from St. John who lived in Carribean Estate. Seen against the looming spectre of the weakness in the identification evidence alluded to above, this assumes increased importance.

32. *Fifth*, this possibility of another person as the possible defiler is accentuated by the fact that both the Complainant's mother and the examining doctor appear to have botched the investigations.

If the Complainant's mother had reported to the Police in the same night she noted the spermatozoa in the genital organs of the Complainant, high chances are that there would have been scientific evidence to identify the perpetrator. It is also curious that the doctor did not do a High Vaginal Swab. It seemed extremely curious that the doctor thought that a High Vagina Swab was not appropriate because the victim was a child.

33. *Sixth*, and perhaps the most importantly, the defence claims that the Appellant did not live at the place where the Complainant was allegedly defiled were not displaced or addressed. The Appellant called his landlord as a witness and produced rental receipts. It was incumbent upon the Prosecution to demonstrate that the Appellant actually lived in the house the Complainant claimed she was assaulted in. The Investigating Officer claimed that she visited the scene of the crime, found the house but found no neighbours to question. She never bothered to go back on a different day or time to tighten her case. Neither did she find necessary to interrogate the Appellant's claims that he, in fact, lived elsewhere. In my view, this alone, would have raised reasonable doubts on the Prosecution case.

34. All in all, the evidence on record raises reasonable doubts whether it was the Appellant who defiled the Complainant. On the totality of the evidence adduced, it was unsafe to convict.

**35. In the circumstances of this case, it is the duty of this Court to quash the conviction and set aside the sentence imposed which I hereby do. The Appellant shall be set at liberty unless otherwise lawfully held in custody.**

36. Orders accordingly.

**Dated and delivered at Nakuru this 14<sup>th</sup> day of May, 2020**

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**JOEL NGUGI**

**JUDGE**

**NOTE:** This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Verne Odero, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.