



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 31 OF 2019

CORAM: D.S. MAJANJA J.

BETWEEN

STANLEY KIURIO M'IKUURO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. T. Madowo, RM

dated 26th November 2018 at the Magistrate's Court at Meru

in Sexual Offence Case No. 82 of 2016)

JUDGMENT

1. The appellant, **STANLEY KIURIO M'IKUURIO**, was charged with the offence of defilement contrary to **section 8 (1) and (2)** of the **Sexual Offences Act** ("the Act"). It was alleged that on diverse dates between 5th February 2014 and 24th February 2014 at [particulars withheld] Market in Imenti North district within Meru County, he did intentionally cause his penis to penetrate the vagina of FM, a child aged 16 years.
2. The appellant was convicted and sentenced to 15 years' imprisonment. He now appeals against conviction and sentence based on the supplementary grounds of appeal filed on 2nd April 2020. The thrust of those grounds is that the prosecution failed to prove its case beyond reasonable doubt. That the evidence against him was contradictory and full of falsehoods. He also complained that the trial magistrate did not consider his alibi defence. The appellant submitted that he was denied a fair trial and that the charge against him was defective.
3. The respondent relied on written submissions. Its position was that the prosecution proved all the elements of the offence beyond reasonable doubt.
4. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**).
5. The complainant in this case, FM (PW 2), testified on oath that she was 16 years old and was in form four at a nearby mixed school. She recalled that on 5th February 2014, she did not go back home as she feared she would be beaten as she had spent the Kshs. 500/= her mother gave her to pay her school fees. PW 2 went to the appellant's house on 6th February 2014 where she stayed with him for three weeks. She told the court that during that time the appellant forced her to have sexual intercourse with him. During this time, she never left the house as he locked her in and told her that he would kill her if she screamed. When he heard the police were looking for her, the appellant told her to leave. She did not go directly home but went to stay with a certain lady. PW 1 testified that the appellant called her to come back when the trouble was over. When she went back to his home, she was arrested with the appellant.
6. PW 2's mother, PW 3, recalled that PW 2 did not come home on 6th February 2014. She suspected that PW 2 was with the appellant as she used to call him using her sister's phone. With the assistance of the community volunteer children's officer, PW 4, and PW 2's sister, they managed to locate the appellant when they called his phone and he answered. They confronted him about PW 2 but he denied that he knew where she was. They reported the matter to the police station. She told the court that she was later informed that PW 2 had been rescued.

7. PW 4 was informed that PW 2 had been missing. She assisted in reporting the matter to the police and on 21st February 2014, she was able to call the appellant to the police station from the number she was given by PW 2's sister. Later on she called the appellant who came to the police station with PW 2 whereupon he was arrested.

8. PW 5, a community volunteer children's officer, recalled that on 20th February 2014, he was informed by PW 3 that PW 2 was missing and that she knew the appellant's phone number. He called the phone number and the appellant identified himself. He assisted PW 3 report the matter to the police. Later on the appellant called him for advice. He also stated that he had seen PW 2 at a crusade. He then told PW 4 who found the appellant and PW 2 and escorted them to the police station.

9. The investigating officer, PW 6, gave an account of the investigation while PW 1, a medical doctor, produced the P3 medical form which was signed by his colleague who examined PW 2. The examination revealed that the labia and vagina was normal but with a broken hymen. He did not find any spermatozoa or infection. He opined that the absence of the hymen was not sufficient to establish defilement.

10. In his sworn defence, the appellant denied the offence. He recalled that a girl came to his place of work on 18th February 2014 at about 10.00am and asked for his phone to call her mother. She left with the phone. His friend and witness, DW 2, told him that when he called the number the girl answered. He looked for the girl, found her and took her to the police station where he was arrested. DW 2 testified that the girl came to their place of work and took the appellant's phone and left.

11. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. "Penetration" under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

12. I have considered and re-evaluated the entire evidence and I find that the prosecution's case principally rests on the testimony of PW 2. She narrated how she ran away from home as she feared that she would be disciplined for spending her school fees. She narrated her ordeal in the hands of the appellant with whom she stayed with for three weeks during which time she was sexually assaulted by the appellant. In light of **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, this evidence was sufficient to sustain a conviction of the appellant without corroboration if, for reasons stated, the trial magistrate believed that the child was telling the truth. In this case though, the magistrate who wrote the judgment did not have the opportunity of hearing PW 2 testify. However, there was sufficient corroboration of PW 2's testimony from the testimony of PW 3, PW 4 and PW 5 who all testified that PW 2 had been reported missing for the period she was with the appellant. They all narrated how they were able to trace the appellant by calling him on the telephone number which they received from PW 2's sister who had been calling him.

13. Apart from PW 2's testimony, the prosecution relied on the medical evidence produced by PW 1. The doctor who examined her on 2nd September 2014 did not find any remarkable evidence apart from the fact that the hymen was broken. Despite the paucity of medical evidence, other evidence implicating the appellant was sufficient to implicate him. The Court of Appeal has upheld the principle that the absence of medical evidence is not decisive of the fact of penetration as it can be proved by oral testimony of the victim or by other circumstantial evidence (see **Kassim Ali v Republic, MSA CR APP NO. 84 of 2005 [2006] eKLR** and **Dennis Osoro Obiri v Republic NRB CR APP NO. 279 of 2011 [2014]eKLR**).

14. I also find the appellant's defence to be an afterthought and contrived. He could not explain how his phone number was found with a stranger and that by coincidence it was connected to the person he had kept in his house for three weeks.

15. Finally, and on the issue of the age of the complainant, I hold that apart from testifying that she was in school at the time she was subjected to the felonious act, her mother, PW 3, testified that she was 14 years old while the age assessment in the P3 medical form stated that she was 16 years old when she was examined. I therefore agree with the trial magistrate that the child was aged 16 years old and therefore a child.

16. From the totality of the evidence, I find that the prosecution proved all the elements of the offence of defilement. I therefore affirm the conviction.

17. The mandatory sentence prescribed under **section 8(4)** of the **Sexual Offences Act** is 15 years' imprisonment which the trial magistrate imposed. The Court of Appeal has since declared the mandatory minimum sentence unconstitutional in several cases among them; **BW v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and in **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014**.

18. I affirm the conviction and allow the appeal only to the extent that I quash the sentence of 15 years' imprisonment and substitute with a sentence of **eight (8) years** imprisonment from **25th February 2014**.

DATED and DELIVERED at NAIROBI this 14th day of MAY 2020.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.