



REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA IN BUNGOMA

CRIMINAL APPEAL 59 of 2019

CKN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the conviction and sentence in original Sirisia Law Courts criminal case No. 45/2019 delivered on 16.5.2019 by Hon Watima ,RM]

J U D G M E N T

The appellant CKN was charged with the offence of defilement of a child (girl) contrary to section 8(1) as read with sub-section 2 of Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the diverse dates between January 2018 and September 2018 at [particulars withheld] village in Cheptais Sub-county within Bungoma County he intentionally and unlawfully caused his penis to penetrate the vagina of SCN a Child aged 14 years.

He also faced an alternative charge of committing indecent act with a child contrary to section 11 of the sexual offences Act No. 3 of 2006 based the same facts. The particulars of the alternative charge were that on the diverse dates between January 2018 and September 2018 at [particulars withheld] village in Cheptais Sub-county within Bungoma County the appellant intentionally and unlawfully touched the vagina of SCN a Child aged 14 years.

The evidence before the trial court was that **Pw1 SCN** the complainant is a student in standard 7 at [particulars withheld] Primary School and stays at Cheptoror. She testified that in May 2018, they used to sleep in the same house that is three girls and two brothers. She testified that girls used to sleep on the floor while boys used to sleep on the bed. She recalled that one-night C came down on the floor and had sex with her. She testified that he did not force her to have sex and she did not tell anyone. She testified that on 20/9/2018 while seated under a tree during a meeting with nyumba kumi she was asked who defiled her and she stated that it was her brother and father. She testified that the nyumba kumi people called police officer who came and arrested them.

PW2 James Butaki Chongoi the village elder of Chebuk Location stated that he was headed to [particulars withheld] Primary School. He testified that he met one Geoffrey Masai, who informed him that the accused had reported that he is been threatened by his father. He testified that a meeting was held and accused father indicated that the accused had defiled the complainant making her expectant. He testified that the complainant was interrogated and he categorically stated that she was defiled by the accused and her father S. He testified that the complainant stated that accused had defiled her recently while her father had been doing it for quite a long time.

PW3 Maasai Geoffrey Kasiri a nyumba kumi chairman testified that one N informed him that his son was threatening him. He stated that a meeting was held between the accused and one N where it was established that the two were quarreling over a girl the complainant herein. He stated that the three were arrested.

Pw4 Onesmus Wafubwa a clinical officer testified that he attended to the complainant on 21/9/2018. He testified that the complainant the victim had been impregnated by a known person and that the girl was expectant 24/30 weeks old. He testified that he examined the girl and filled a P3 form and treatment notes produced as P Exhibit 1 and 2.

Pw5 the Investigating Officer No.555401 CPL Peter Marwa stated that he was at Chwele market on 21.9.2018 when he received a call from the village elder [particulars withheld] Village.

He testified that he was informed by the public that two men were almost getting lynched by the public. He testified that that he went to the scene and took the three to the police station. He testified that he learnt that the accused and another had defiled and impregnated the complainant.

On interrogation the victim informed him that her father had started defiling her when she was 12 years old. She informed him that she confided in her brother who instead of helping threatened to kill her if she did not have sex with him. He stated that she then started

engaging in sex with the accused until the father noticed and he reported the issue to the chief.

Upon close of prosecution's case the accused was placed on his defence and he opted to give sworn evidence and called one witness.

DW1 CKN, the accused testified that on 10/9/2018, he left his grandmother's home and proceeded to Cheptoror where his sister was staying with his father. He testified that he noted that his sister was not well and he inquired. The sister informed him that his father had been defiling her and he reported the issue Nyumba Kumi officials. He stated that on 20/9/2018 while he was at the farm he was called to a meeting with his father and sister and he was surprised when he was arrested.

Dw2 Judis Kapugei stated that he does not have anything to say about this case.

After full hearing it is upon the above evidence that the trial court found the accused guilty, convicted him and sentenced him to 20 years imprisonment. Being dissatisfied with the judgment the Appellant has appealed to this court on the following grounds:

- i. That the learned trial magistrate erred in law and facts hence convicting the appellant on insufficient evidence.*
- ii. That the sentence was against the weight of the evident.*
- iii. That the learned trial magistrate violated the appellants constitutional rights by overstaying him in custody and failed to accord appellant fair trial.*
- iv. That the learned trial magistrate erred in law and facts by failing to adhere to provisions of section 36 of the SOA.*
- v. That the learned trial magistrate erred in law and fact by not analyzing expeditiously pw1 report, statement and evidence.*
- vi. That the learned trial magistrate failed to find out that PW2 and area chief were compromised by the appellant's father.*

The appellant filed his written submissions in which he submitted that the prosecution purposely erred in law and fact hence appellant was convicted on insufficient fabricated and unreliable evidence. He submitted that the conviction was against the weight of evidence adduced by the prosecution and therefore the sentence of 20 years is harsh. He submitted that the age of the complainant was fabricated and that the appellant's constitutional rights were violated.

The prosecution opposed the appeal prosecuting counsel Nyakibia she submitted that on age that the complainant age was proved that she was 14 years old and that a birth certificate was produced to prove the same. She submitted on identification that the complainant was well known to the appellant and the appellant is a step-brother to the complainant.

This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno VS R 1972 EA** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to review the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt.

The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence.

On the age of the complainant, the prosecution produced a birth certificate as exhibit 3 and the same showed that the victim was born on 25/10/2003 which means the complainant was 14 years old at the time of the incident. The clinical officer also adduced evidence that the complainant's age assessment was done and showed that she was below 18 years old.

The Sexual Offences Act promulgated some rules towards the achievement of its objectives. Those rules known as **"The Sexual Offence Act (Rules of Court) 2014** came into force on 11/07/2014 under Legal Notice No. 101. Under **Rule 4 thereof**, the age of the complainant may be determined by way of a Birth Certificate, any school documents, a Baptismal Card or any other similar document. It is therefore the finding of this Court that on the evidence, the complainant was a minor at the alleged time of commission of the offence.

On the issue of penetration I wish to state that in demonstrating this particular ingredient of the offence, the victim from evidence adduced has stated that she was defiled by her father and accused. She stated that her father has been defiling her since she was 12 years old before the appellant began defiling her as well.

The victim categorically stated how the appellant defiled her in May 2018 and I quote;

"One night, C came down on the floor and had sex with me. He used his penis, inserted it into my private parts".

Section 2 of the Sexual Offences Act defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

This position was fortified in the case of **Mark Oiruri Mose vs R (2013) eKLR** when the Court of Appeal stated thus:

“...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be available. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ....”

The clinical officer who examined the complainant stated that on 12/1/2018 when he examined the victim, she had been impregnated by a known person and as at 24/9/2018 she was around 24 weeks approximately 6 months old pregnant. Going by the foregoing evidence it is clear that the complainant must have conceived between April and May which is in line with the complainant’s evidence that she had sex with the accused in May 2018. It is therefore the finding of this court that the act of penetration was effectively proved.

On whether the Appellant was the perpetrator, as the Appellant has denied committing the alleged offence, that calls for an in-depth examination of the circumstances so as to settle the issue as to whether the Appellant was rightly identified as the perpetrator of the offence.

The appellant has prayed for leniency on the sentence. Sentencing is discretion of the court and the high court can only interfere if the sentence is illegal or was arrived at by applying wrong principles of law. From the evidence on record it emerged that the complainant was a minor aged 14 years old.

Section 8(4) of the sexual offences act provides:

“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 trial magistrate sentenced the appellant to a 20 years imprisonment. Considering age of the minor that she was only 14 years and the aggravating circumstances.

In the premises the appeal herein is found without merit and is hereby dismissed.

Dated, signed and delivered at Bungoma this 5th day of June, 2020.

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S N RIECHI

JUDGE