



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 156 OF 2013

HOSEA NJUGUNA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against Judgment, conviction and sentence in Cr. Case No. 1385 of 2010,

R vs Hosea Njuguna at Molo, delivered by H.M Nyaga, S. P.M on 12th June 2013).

JUDGMENT

SUMMARY

1. Hosea Njuguna (hereinafter referred to as the appellant) seeks to quash the conviction and sentence passed against him by the learned Senior Principal Magistrate in criminal case number **1385 of 2010**, wherein he was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act and sentenced to life imprisonment.
2. The particulars of the charge are that on the 13th of May 2010 at Turi in Molo District, Rift Valley Province he caused his genital organs, penis, to penetrate the vagina of MW, a girl aged 15 years in violation of the said act. He faced alternative count of committing an indecent act with a child.
3. The Appellant argued in his grounds of appeal that the trial magistrate erred in law and fact by failing to appreciate the law. It was his case that the prosecution did not prove their case beyond reasonable doubt. He filed written submissions expounding his grounds of appeal. His arguments are detailed out later on in this determination.
4. Having not had an opportunity of hearing the witnesses, it is the duty of this court, to review the evidence and make its own conclusion in determining whether the conclusion of the trial court may be upheld. This was the holding in *Okeno v. Republic*.^[1] Similarly in *Kiilu & Another vs. Republic*,^[2] the Court of Appeal stated thus:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses”.

THE EVIDENCE

5. **PW1**, the complainant, then in Standard 8 at [Particulars Withheld] Primary School stated that she was 15 years old at the time of giving her testimony. She testified that on the material day, she was home alone after being sent away from school for school fees/ not having a geometric set. As she was bent sweeping the floor, the door was flung open and she was held by the neck, knocked down and her inner pants torn. According to her, the person did not talk but she was able to identify him as the appellant who is her neighbour. He removed his penis, raped her and ejaculated. She cried but did not scream as the person had strangled her. It was her testimony that the dress she was wearing was torn and soiled. She testified that she informed one Baba Jane of the incident, and he in turn phoned the police. The appellant was however gone by the time the police arrived. She also phoned her mother who had gone for prayers and explained the happenings to her. Her

mother then took her to Molo Hospital where she was treated and referred to Molo Police Station. She was given a P3 Form at the Police Station and her dress and panties taken by the police. According to the complainant, it was the first time she had sex.

6. On cross-examination, she testified that she knew the appellant and that they stayed on the same plot. She testified that Baba Jane's house was not far and neither was the appellant's house. According to the complainant, Baba Jane was the only one present. She testified that she did not scream after the appellant left because she was in shock and was not aware if the appellant was seen by people.

7. On further cross examination, she testified that nobody witnessed the incident except her and the appellant. She testified that by the time she went to inform Baba Jane of the incident she had already changed her clothes. She testified that the appellant was staying with his father.

8. The complainant was later recalled to testify. It was her testimony that on the material day she was at home because she did not have a geometrical set and had been sent home. She testified that after the appellant had left, she went outside to ask for help and ran into PW3, who was going to church. She therefore sent PW3 to call her mother. Afterwards, the complainant told her mother about the incident. She testified that she gave the clothes she had been wearing during the incident to the police.

9. **PW2, TWN**, the complainant's mother testified that on 13th May 2010 at 8:30a.m she went to church and left the complainant who did not have a geometrical set behind. At about 9:30 a.m one Annah Wamuyu informed her that she needed to go home immediately as her daughter was weeping. On her way home, she ran into one Hellen Wambui whom she requested to accompany her home. They arrived at PW2's home and found the complainant who disclosed that she had been raped by the appellant. PW2 testified that she observed that the complainant's dress and pants were torn. She took the complainant to the hospital and reported to the police whereupon she was issued her with a P3 form.

10. On cross-examination, she testified that she had known the appellant for some years and knew where he stayed. According to PW2, the church was about 30 minutes' walk. She denied having borrowed money from the appellant the previous Friday. It was her testimony that her daughter first informed one Baba Jane of the incident, and that she (PW2) could not raise alarm as the appellant had already gone by the time she arrived. On further cross-examination, she testified that she did not know how far the church was from the house, and that Hannah Wamuyu did not stay in the same plot as the complainant. She testified that it is Hellen who had collected the complainant's panty, and that it was normal for a woman to have monthly periods. She denied having differences with the appellant's wife. She further testified that the accused was not found until 15th June 2010, and that the police took the complainant's underpants and dress. She clarified that the complainant had been sent from school because she did not have a geometrical set.

11. **PW3, Hannah Wamuyu** testified that she hailed from Kiambiriria and that on 13th May 2010 at 9:00am she was at home. On her way to church she met the complainant who requested her to go and call her mum immediately, and she obliged. The complainant was crying but did not disclose why. She knew the accused but not very well. On cross-examination, she testified that she was just passing by PW2's homestead and did not see the appellant.

12. **PW4, Hellen Wambui** testified that she lived in Molo, and that on 13th May 2010 she was going for "Ushirika" at Ngenia when she met PW2, a member of their "Ushirika" who was rushing back home. PW2 requested her to accompany her to her home and on arrival, they found the complainant crying. The complainant disclosed to them that the appellant had defiled her. She testified that she went to the kitchen and saw a pair of black torn pants. The appellant was not known to her. On cross examination, she testified that she did not find the appellant at the scene.

13. **PW5, Robert Warui Wang'ondo (Baba Jane)** testified that on 13th May 2010 he was at his farm. He met the complainant on the road distraught and crying continuously. When he asked what had happened, she narrated that the appellant had raped her. He testified that he did not see the appellant then but knew him as a neighbour. He called the police with his phone and the complainant's mother came and took her to the hospital. On cross-examination, he testified that there was a narrow road between the appellant's house and the complainant's home, and that he had found the complainant by the road between 9 and 10am. He testified that he was also known as Baba Jane.

14. **PW6, Clinical Officer Alice Wanjiru** testified that she worked at the Molo District Hospital. She produced the P3 form and outpatient card. She testified that she examined the complainant on 14th May 2010 over alleged defilement. Upon examination, her hymen was found to be broken and there were lacerations on the labia minora. Laboratory tests did not show the presence of spermatozoa. PW6 concluded that the complainant's injuries were consistent with sexual penetration. The complainant was treated with P.E.P to prevent AIDS, pregnancy drugs and antibiotics.

15. **On cross-examination**, she testified that the complainant had injuries on her vagina and there was blood on her underpants. The blood was not tested. She testified that a girl of 15 years was likely to be having monthly periods. She stated that she did not see any injury on the complainant's neck. It was her testimony that spermatozoa stay alive for 72 hours and that she did not examine the appellant. Further, that it was not given that ejaculation takes place. When she was later recalled, PW5 clarified that the complainant went to the hospital on 13th May 2010 while the P3 form was filled on 14th May 2010.

16. **PW7, PC Leah Chesang** testified that at the material time she was attached to Molo Police Station and that she was on duty on 14th May 2010 at 9:00a.m when the complainant was brought by her mother. According to PW7, the complainant was about 13 years old. She reported that she had been defiled, and that they had been to hospital. She issued them with a P3 form. PW7 produced the complainant's panties and torn dress as exhibits. It was her testimony that the appellant was later arrested and charged accordingly. On cross examination, she testified that she did not visit the scene, and did not take the appellant to hospital after he was arrested. She testified that the appellant was arrested in June and not May, but noted that her statement may have an error in the month.

17. At the close of the prosecution case, the trial magistrate, in keeping with the provisions of Section 211 of the Criminal Procedure Code ruled that the appellant had a case to answer. The appellant elected to give unsworn evidence and did not call any witnesses. He denied the charges. He testified that he was at home with his wife on 15th June 2010 when the police came with the complainant's mother. He testified

that he was at home the whole time, and the root of the matter was a house that his father had left him, which the complainant's mother wanted.

18. From the charges, the evidence adduced and submissions thereon by the parties, the issues for determination by the court are whether the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act was proved and whether the appellant was the perpetrator.

19. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. Section 2 of the Act defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person." While, "genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus." It is now settled law that for the prosecution to establish the charge of defilement, it must establish three ingredients; firstly, the age of the complainant, secondly, penetration and thirdly, the identity of the perpetrator. See the case of *Charles Wamukoya Karani vs. Republic* [3] where it was stated that:-

"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

20. Proof of age of a child is a question of fact and as regards the offence of defilement it is necessary firstly, to establish the offence of defilement which is committed if the victim is below the age of 18 years and secondly, to establish the penalty applicable. From my reading, the trial court's judgment does not reflect any finding and/or determination on the issue of the age of the complainant. I will nonetheless delve into the prosecution's evidence to ascertain whether the age of the complainant was proved. Ordinarily, the best possible evidence to prove age in cases of defilement is a birth certificate, birth notification, an immunization card or in some instances a baptismal card. However, where this best evidence is not available, the prosecution can rely on other documentary evidence such as the medical report and the P3 form. The prosecution can also rely on the testimony of the parents of the complainant and by the court visually satisfying itself as to the apparent age of the complainant. This position was upheld by the Court of Appeal in *Richard Wahome Chege -vs- Republic* [4] and *J.W.A. -vs- Republic*. [5] Apart from the P3 form which shows the complainant was aged as 13 years, no evidence was led to prove the age.

21. The complainant testified that on the material day, she was home alone after being sent from school for school fees/ not having a geometric set. While she was bent sweeping the floor, the door was flung open and she was held by the neck, knocked down and her inner pants torn. According to her, the person did not talk but she was able to identify him as her neighbor, the appellant. He removed his penis, raped her and ejaculated. She cried but did not scream as the person had strangled her. It was her testimony that the dress she was wearing was torn and soiled. **PW2** testified that she had gone to church on the material day, and one Annah Wamuyu later informed her that she needed to go home immediately and tend to her daughter who was weeping at home. She arrived at her home in the company of one Hellen Wambui. The complainant confided that she had been raped by the appellant. From **PW2's** observation, the complainant's dress and pants were torn. She took the complainant to hospital and filed a police report. **PW4, Hellen Wambui** testified that on the material day **PW2** requested her to accompany her to her home, where on arrival, they found the complainant crying. The complainant disclosed to them that the appellant had defiled her. It was her testimony that she went to the kitchen and saw a pair of black torn pants.

22. **PW6, Clinical Officer Alice Wanjiru** produced the P3 form and outpatient card. She testified that upon examination on 14th May 2010 over alleged defilement, the complainant's hymen was found to be broken and there were lacerations on the labia minora. Laboratory tests did not show the presence of spermatozoa. It was her conclusion that the complainant's injuries were consistent with sexual penetration. She testified that the complainant was treated with P.E.P to prevent AIDS, pregnancy drugs and antibiotics. **PW7, PC Leah Chesang** testified that at the material time she was attached to Molo Police Station and that she was on duty on 14th May 2010 at 9:00am when the complainant and her mother reported that she had been defiled, and that they had been to hospital. She issued them with a P3 form. She produced the complainant's panties and torn dress as exhibits. Having perused the evidence and record before this Court, I am convinced that the complainant was defiled. Even though the laboratory tests did not show the presence of spermatozoa, this fact does not negate penetration. In this regard, Section 2 of the SOA defines penetration to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person". The medical report and the evidence particularly of the complainant **PW6** and **PW7** point to one fact; that there was penetration. I am therefore inclined to agree with the trial court's finding that there was penetration.

23. As narrated by the complainant, she was home alone after being sent from school for school fees/ not having a geometric set. According to her, the person that defiled her did not talk but she was able to identify him as her neighbor, the appellant, who was known to her. **PW2** testified that she arrived at her home and found the complainant who disclosed that she had been raped by the appellant. She testified that she had known the appellant for some years and knew where he stayed. According to **PW2**, she (**PW2**) could not raise alarm as the appellant had already gone by the time she arrived. The P3 form and medical records also showed that the complainant had a history of having been defiled by a person known to her. **PW5, Robert Warui Wang'ondo** testified that the complainant narrated to him that the appellant had raped her. He testified that he did not see the appellant then but knew him as a neighbour.

24. There is no reason apparent to me that would lead the complainant and her mother to conspire to lie against the appellant. As has been stated by **PW2**, there was no previous disagreement between her and the appellant and/or the appellant's wife. In any case, the appellant did not offer any reasonable alibi that would negate the allegations that he was present at the scene of the alleged incident. His prolonged absence and/or sudden disappearance after the incident is also quite telling. I am therefore persuaded that the trial magistrate rightly found that the appellant defiled the complainant.

25. As for the sentence, the learned trial magistrate imposed a sentence of 22 years imprisonment. Section 8(3) 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". As I have already stated earlier herein, the complainant was aged between 13-15 years at the time of the offence. It was held in the case of *Kaingu Elias Kasomo vs Republic* [6] thus:-

"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by

credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

26. In the circumstances, I see no reason to tamper with the conviction. As for the sentence, I lower it to twenty years imprisonment, being the minimum prescribed under the law.

Right of appeal explained.

Signed, Delivered and Dated at Nairobi this 4th day of June, 2020

John M. Mativo

Judge

Signed, Delivered and Dated at Nakuru this 4th day of June, 2020

Joel Ngugi

Judge.

[1] {1972} E.A. 32

[2] {2005} 1 KLR 174.

[3] Criminal Appeal No. 72 of 2013.

[4] Nyeri C.A. Criminal Appeal No.61 of 2014.

[5] Nyeri C.A. Criminal Appeal No.100 of 2013.

[6] Malindi Court of Appeal, Criminal Appeal No. 504 of 2010.