



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 99 OF 2019

(Being an appeal from the decision of Hon.V. Karanja in Kitale criminal Case No. 11 of 2019 delivered on the 30th September 2019)

CORNELIUS MUTAI.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 10th day of January 2019 in Kwanza Sub-County within Trans-Nzoia County in the Republic of Kenya intentionally caused his penis to penetrate the vagina of EN a child aged 15 years**.
2. The alternative charge was **committing an Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. Trans-Nzoia County in the Republic of Kenya intentionally touched the vagina of EN a child aged 15 years with his penis**.
3. The Appellant after a full trial was convicted and sentence to 20 years' imprisonment hence this appeal. Counsel for the appellant has raised several grounds of appeal, namely, **that the case was not proved beyond the shadow of doubt; the medical evidence did not establish the offence; the evidence was contradictory and that the sentencing was not proper**.
4. Before looking at the merits or otherwise of the appeal it shall be necessary to summarise the evidence as presented during trial.
5. **PW1**, the Complainant testified that she was 16 years old and a form two student at [Particulars Withheld] secondary school. She said that on the 10th day of January 2019 at around 6.00 p.m she was coming from the market where she had gone to collect her father's phone which it had been taken for charging. On the way she met the Appellant, a person she knew, who snatched the phone from her and told her to follow him.
6. The Appellant forcefully took her to his two roomed house where he proceeded to defile her. She said that she tried to resist but the Appellant threatened to stab her with a knife. The door had been locked and she was unable to escape. She left at around 5.00 pm where she informed her father what had happened. Her father took her to Kwanza police station where a report was made and she was later escorted to Kitale district hospital. She denied having any grudge with the Appellant.
7. When cross examined she said that the Appellant's house is closer to their home. She said that there were no people in the area and that the Appellant did not cover her mouth but threatened to stab her.
8. **PW2 JOM** the Complainant's father testified that she had not arrived home by 8.30 pm on the material day since she had gone to the shamba. He went looking for her in the shamba but she was not there. He also went to his relatives but in vain. At around 5am she came back home looking distressed. She told them what had transpired between her and the appellant. Her skirt according to him was blood stained. He went and reported the matter at the police station and later took her for treatment.
9. When cross examined he said that they were area mates with the Appellant and they lived close to each other. He said that the Appellant surrendered to the police.
10. **PW3 JOHN KOIMA** a clinical officer from Kitale County Referral hospital examined the Complainant on the 11th January 2019 and found that she had abdominal tenderness, the hymen was torn and old looking, there were bruises on the labia's and he thus concluded that there was sexual assault. He produced the P3 Form.

11. When cross examined he said that the Complainant had engaged herself in sexual activity and that is why the hymen was old looking and she had injuries on her labia and bloodstains on her private parts.

12. **PW4 P.C PATRIC MUTAI** testified on behalf of **P.C MADINA** the investigating officer. He said that the compliant was brought to the station on the 11th January 2019 and thereafter escorted to the hospital where it was confirmed that she had been defiled. She gave the name of the perpetrator who was arrested and charged with the offence. He produced the certificate of birth which indicated that the complainant was born on the 25th January 2003.

13. When placed on his defence the Appellant gave sworn evidence denying the charge. He said that on the 10th day of January 2019 at around 8.00 pm he was in his house with one Daniel Masibo betting. His said friend left around 10.00 pm and he slept. He denied that he saw the complainant who was his neighbour on the material day.

14. He went on to state that the Complainant has always framed people over defilement and he gave an example of a pastor with a church called African Divine. He said that he reported the matter to the chief who summoned her but he was instead arrested. He said that the charges were framed up.

15. When cross examined he said that the issue of the pastor was settled at home and it was never reported. He said that he was never taken for examination.

16. **DW2 DUNCAN MASIBO** testified that the appellant was his friend and they were together that evening at around 8pm doing betting and he left at 10:30 pm without seeing the Complainant. He said that the charges facing the Appellant were all false.

17. When cross-examined he said that he was not with the accused at around 8.00 pm and that his house was a single room partitioned with a curtain.

ANALYSIS AND DETERMINATION

18. When the matter came up for hearing the court directed that the same be disposed by way of written submissions which the parties have complied. The appellant has faulted the evidence as presented in particular that the alleged skirt which had blood stains was never produced.

19. The Appellant further submitted that there was no prove that the Complainant had been defiled that day taking into account that the medical evidence on record showed that the hymen was old looking. The Appellant relied on the authority of **JOHN MUTUA MUNYOKI VERSES REPUBLIC. NAIROBI CRIMINAL APPEAL NO. 11 OF 2016.**

20. The learned State Counsel submitted in support of the findings by the trial court. He said that the ingredients of the offence namely, the age of the victim, the identity of the perpetrator as well as the penetration had been proved.

21. The duty of this court at this juncture was explained by the court of appeal in the case of **KIILU & ANOTHER VERSES REPUBLIC (2005) 1KLR 174** when it stated that;

“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.”

22. For an accused person to be convicted of the offence the three ingredients which ought to be proved are the age of the Complainant, penetration and a positive identification of the assailant. (See **CHARLES WAMUKOYA KARANI VS REPUBLIC, CRIMINAL APPEAL NO 72 OF 2013.**)

23. In this case the age of the complainant was not in dispute. The certificate of birth produced clearly demonstrated that she was almost two weeks away from being 16 years.

24. As to whether she was defiled, the evidence on record showed that she had engaged herself in sexual activities prior to this day. When cross examined, pw3 stated as follows;

“she had previously engaged in sexual act as her hymen was old and torn. She had injuries on her labia’s but she had blood stains on her private parts.”

24. The medical examination was done on the following day, less than 24 hours after the defilement. In my view, even though the hymen was torn and old looking it did not stop the Clinical Officer from concluding that she had injuries and blood in her private parts.

26. There was no contrary evidence that she may have sustained the injuries elsewhere that night. At any rate an absent of hymen does not oust evidence of penetration. The injuries on the labia were recent and consistent with the fact that she had just been defiled.

27. It is also worthy to note that the incident was reported by the Complainant that very morning and she was taken for treatment on the same day. There was therefore no room for one to argue that the evidence may have been tampered or that she may have forgotten some facts.

28. Much emphasis has been laid by the appellant on the issue of the complainant's skirt which was allegedly blood stained and that the same ought to have been produced. Whereas that allegation was raised by the father to the Complainant and not the Appellant, it is not very material in my view for the simple reason that the medical examination found that there was blood on her private parts as well as recent fresh injuries. Failure to produce the blood-stained dress did not weaken the Respondent's case.

29. In the premises, the court finds that the ingredient of penetration was proved by the Respondent.

30. On the question of identification of the assailant, the evidence on record indicates that the incident took place at night that is from around 8pm to 5am the following day. The Complainant and the Appellant do not deny the fact that they knew each other as they are neighbours. The same was confirmed by PW2. Having spent those hours together, it is not really rocket science to note that the Complainant was able to identify her assailant very well. There was nothing to suggest that there was any impediment to identification.

31. The Appellant argued in his defence that the Complainant and her father have been known to extort money from people through such allegations. That line of defence was not raised during the cross examination of either of them. Neither was the alleged ADC church pastor called by the Appellant to confirm the allegations. Perhaps it would have been better to rope in the area chief whom the appellant made the report and sought to have him hear the matter.

32. The authority of **JOHN MUTUA MUNYOKI** (see above) relied on by the appellant can be distinguished in the sense that unlike in that case, the case at hand is different because there was evidence of injuries to the labia as well as bloodstains in the private parts.

33. There was therefore no contradictory evidence as per the Appellant's grounds of appeal. The Complainant although a single witness so to speak in terms of the fact that there was no other eye witness was truthful in all respect as per the requirements of Section 124 of the Evidence Act Chapter 80 Laws of Kenya, which states as hereunder;

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

34. The Appellants defence raises issues which ought to have been raised during cross examination. He tried to impute bad character on the Complainant and her father, but as found above the same did not arise during their cross examination.

35. The last ground of appeal raised by the appellant is to do with the age of the Complainant. He has submitted that the same was not established beyond the shadow of doubt. This is however not the case was. The certificate of birth produced indicated that she was born on the 25th January 2003 meaning that she was almost close to 16 years. The same age was indicated in the P3 form as well as the treatment notes produced.

36. The court of appeal in the case of **AMBROSE MWAWINDO NGWATU VERSES REPUBLIC (2016) ECLR** had this to say concerning the issue of age;

“A salient ground of appeal is the appellant's contention that the age of the complainant was not proved beyond reasonable doubt. The age of the complainant is a question of fact to be proved by evidence. We have examined the record and are satisfied that the age of the complainant was proved by the medical assessment report (P EX 2) and P3 Form (P EX 1) that shows the complainant was below the age of 15 years. We are satisfied that the complainant was a child falling within the age bracket of 12 to 15 years envisaged under Section 8 (3) of the Sexual Offences Act.”

37. The only reprieve this court shall grant the Appellant though is on the issue of sentencing. The conviction was proper in the circumstances. This court takes into account the two weeks to the next birthday of the Complainant. In the now famous case of **FRANCIS MURUATETU & ANOTHER VERSES REPUBLIC, SUPREME COURT PETITION NUMBER 15 AND 16 OF 2015**, the trial courts were given some latitudes to temper with the strict compliance with the compulsory sections of the statutes as in the case at hand.

38. Consequently, the 20 years' sentence imposed against the Appellant is hereby reduced to 13 years custodial sentence from the date of this judgement.

39. The appeal is otherwise dismissed.

Dated, Signed and delivered at Kitale this 13th day of October 2020.

H. K. CHEMITEI

JUDGE

13/10/2020

In the presence of:-

Mr Omooria for Respondent

Ms Arunga for Accused

Accused – present

Court Assistant – Kirong

Judgement read in open court.