



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.41 OF 2019

GIDEON KIPKEMOI.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of Hon. B.R. KIPYEGON (SRM) IN CM'S

Criminal Case No.25 of 2019 Delivered on 17/12/2019)

J U D G M E N T

1. The Appellant was convicted with the offence of defilement and sentenced to 20 years imprisonment in Criminal Case No.25 of 2019 on 17/12/2019.
2. The particulars of the charge were that on 31/3/2019 at [Particulars withheld] Village in Bureti Sub-County within Kericho County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of DC a child aged 13 years.
3. The Appellant was charged with an alternative Count of committing an indecent act with a child in that on the same mentioned particulars as in Count (above) the Appellant unlawfully and intentionally touched the anus and vagina of DC a girl aged 13 years within his penis.
4. The Prosecution evidence in summary was that the Appellant took the Complainant to his home on 31/3/2019 and had Sexual Intercourse with her. The Appellant who was a neighbor was aware that the Complainant was 13 years old.
5. The Complainant subsequently got pregnant with the Appellant's child and the Appellant was subsequently arrested and 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.
6. Doctor Kakili who Examined the Complainant on 8/4/2019 confirmed she had no hymen.
7. The Appellant said in his defence that on the mentioned day he was in away in Nakuru at his Aunt's place and when he returned he was assaulted by the Complainant's father and fixed in this case. He called his father as a witness and his father said the Appellant was an innocent rider because he was unable to take him for further studies.
8. The Trial Magistrate found the Appellant guilty as charged on the main Count and sentenced him to 20 years imprisonment.
9. The Appellant has now appealed to this court on the following grounds:-
 - (i) **THAT** he was convicted on uncorroborated evidence.
 - (ii) **THAT** the Prosecution did not prove the key ingredients of the charge of defilement.
 - (iii) **THAT** the Trial Court rejected the alibi defence raised by the Appellant.
10. The parties filed written submissions in this appeal. The Appellant submitted as follows:-
 - (i) **THAT** the prosecution evidence was contradictory and uncorroborated. The charge sheet stated the offence was committed on 31/3/2019 while the Complainant said she had Sexual Intercourse with the Appellant on 23/3/2019.

(ii) Further, the Appellant submitted that no DNA test was conducted on the Complainant who was alleged to be pregnant. He also submitted that the Medical Examination showed that the Complainant was not pregnant.

(iii) The Appellant submitted that the medical evidence stated that the Complainant was sexually assaulted 3 years prior to the Examination and further from her own testimony, the Complainant said there was no coercion and she indeed slept in the Appellant's house till morning without even raising an alarm.

(iv) The Appellant also submitted that his alibi defence was not taken into Account. He said PW.2 alleged that the Appellant and the Complainant were arrested and taken to the Police Station but the Complainant said the Accused person was arrested on 5th while riding a boda boda. It was further submitted that the charge sheet however indicated that the Appellant was arrested on 7/4/2019 and arraigned in Court on 9/4/2019.

11. The Respondent opposed the Appeal and submitted as follow:-

(i) **THAT** the Prosecution proved the charge against the Appellant to be required standard. That the Complainant after voire dire Examination gave evidence to the effect that the Appellant took her to his home on three occasions and spent a night with and he defiled her.

(ii) The Respondent was submitted that the Complainant testimony was corroborated by that of her mother and to Doctor who Examined the Complainant and found her hymen broken.

(iii) The Respondent further submitted that the birth notification of the Complainant was produced and it confirmed she was 13 years old at the time of the incident.

(iv) The Respondent submitted that the Trial Court considered the Appellant's alibi defence and found it an afterthought which was not backed by any evidence.

12. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see Peters vs. Sunday Post [1958] E.A 424.”

13. To establish a case of defilement, the prosecution was required to prove three elements in order to secure the conviction of the Appellant on the charge of defilement. The first element is penetration. Penetration is defined under **Section 2(1)(d) of the Sexual Offences Act No.3 of 2006** as:-

“the partial or complete insertion of the genital organs of one person into the genital organs of another person”.

14. In the current case, the prosecution proved penetration. The Complainant said the Appellant took her to his home on three occasions and defiled her. This testimony was corroborated by that of the Complainant's mother who confirmed that the Complainant disappeared from home and this prompted her to report to the Police and the Appellant was arrested.

15. PW4, the Doctor who examined the Complainant said the hymen was broken and this is an indication that there was penetration. The testimony of PW4 also corroborated that of the Complainant.

16. The Appellant submitted that no DNA test was conducted on the Complainant who was alleged to be pregnant and further that the Medical Examination showed that the Complainant was not pregnant.

17. I find that there is no requirement that the Complainant has to be pregnant for the prosecution to prove that she was defiled.

18. The second element that the prosecution was required to establish is the identity of the perpetrator. The Appellant was well known to the Complainant and he was positively identified.

19. Under Section 124 of the evidence Act, the Trial Court can rely on the testimony of one witness if for reasons to be indicated, the Trail Court found that the Complainant was speaking the truth. The Trial Court conducted Voire Dire Examination and found the testimony of the Complainant reliable.

20. Section 124 of the **Evidence Act** provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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.”

21. The third element that the prosecution is required to prove is the age of the complainant. Under Section 2(1) of the Sexual Offences Act, the definition of a child is the one assigned thereto in the Children Act. This means any human being of less than eighteen (18) years. In the present appeal, the age of the Complainant was proved by production of the birth notification which showed she was born on 21/02/2006.

22. The Appellant submitted that from her own testimony, the Complainant said there was no coercion and she indeed slept in the Appellant’s house till morning without even raising an alarm.

23. There is evidence that the Complainant was under the age of 18 years and her consent to the act of sexual intercourse was immaterial.

24. I also find that the alibi defence was considered by the Trial Court and found wanting.

25. In the case of **JUSTUS KIRUTHU MWANGI VS REPUBLIC NYERI CRIMINAL APPEAL NO. 70 OF 2015**, the court stated as follows:

“The role of the court when it comes to the determination as to the admissibility or otherwise of an alibi defence is to weigh such a defence(s) against the totality of the prosecution’s evidence to determine whether it is dislodged or not.”

26. The Appellant said in his defence that on the material day he was in away in Nakuru at his Aunt’s place and when he returned he was assaulted by the Complainant’s father and fixed in this case. The Trial Court considered this alibi and said that the Appellant did not raise the same at the onset of the trial.

27. I find that the conviction herein is secure and the sentence of 20 years lawful.

28. I dismiss the appeal and uphold both the conviction and sentence.

Delivered, signed and dated at Kericho this 6th day of November 2020.

A. N. ONGERI

JUDGE