



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 13 OF 2020

KISEVE MARTIN JACKSON.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. G. Omodho – SRM Thika dated and delivered on the 23rd day of July 2018 in the original Thika Chief Magistrate’s Court Sexual Offence No. 4747 of 2016}

JUDGEMENT

The appellant was charged with Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. The particulars of the charge were that on diverse dates between 13th June and 21st June 2016 at [Particulars Withheld] area in Juja Location within Kiambu County, the appellant intentionally caused his penis to penetrate the vagina of CWM, a child aged twelve years.

The appellant was also faced with an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the alternative count were that on the same date and place he intentionally touched the vagina of CWM with his penis.

At the trial four witnesses testified against the accused who then testified on oath and maintained his innocence. However, after evaluating the evidence, the trial Magistrate found the appellant guilty on the main charge, convicted him and sentenced him to a term of imprisonment for twenty (20) years. Being aggrieved by the entire judgement, conviction and sentence, he has appealed on the following grounds: -

“a. THAT the Charge Sheet did not disclose an offence as it did not state that the alleged act was unlawful;

b. THAT the identification evidence was improperly gathered by the Police and wrongly accepted by the trial Court;

c. THAT the trial court erred and misdirected itself by concluding that the complainant was telling the truth despite the fact that the complainant told no one of the sexual assault on 13th June 2016, her evidence was exaggerated, the appellant was not arrested until 24/6/2016 despite the opportunity to do so and that the complainant was taken to hospital one week after the incident;

d. THAT the learned trial Magistrate erred in law and fact in failing to take into account the provisions of Section 124 of the Evidence Act;

e. THAT, THE Superior Court failed to note that the trial court had misdirected itself by concluding that the clinical findings were sufficient corroboration when such findings were devoid of any proof;

f. THAT, the Hon Trial Magistrate erred in points of law and fact by holding that the case for the Prosecution was proved against the Appellant whereas penile penetration was not adequately proved;

g. THAT, the Superior Court erred in law it failed to find that the learned trial Magistrate had erred in law and fact for failure to draw adverse inference against the Prosecution for failure to summon essential witnesses, in contravention of the provisions of Sections 146 (4) and 150 of the C.P.C.;

h. THAT the learned Senior Resident Magistrate erred and misdirected himself in shifting the burden of proof on the Appellant when he convicted the Appellant in shifting the burden of proof on him when the learned Magistrate stated “his defence I however left as an allegation with no proof that he was actually in Kitui...”

i. THAT the trial Magistrate erred in law by failing to note that the burden and standard of proof by the Prosecution was not discharged and thus the Prosecution case was not proved beyond reasonable doubt as provided for under the law, thus the guilty verdict was unsafe and could not be supported having regard to the evidence and that on any ground it was a miscarriage of justice.”

The appeal is vehemently opposed. The appellant canvassed the appeal by way of written submissions while Learned Prosecution Counsel Viola Muthoni submitted orally.

I have carefully considered the grounds of appeal, the rival submissions and the cases cited therein but as the first appellate court my first duty is to reconsider and evaluate the evidence afresh so as to arrive at my own independent conclusion. I have however cautioned to bear in mind that I did not see or hear the witnesses and to give provision for it – (*see Okeno v Republic [1972] EA 32*).

The ingredients of the offence of defilement are: -

- **Proof that the complainant is a child and her age for purposes of sentencing.**
- **Penetration.**
- **Identification of the perpetrator.**

The above three elements must be proved beyond reasonable doubt for the prosecution to succeed. The evidence of a victim of the defilement does not require corroboration and the court may convict solely on the evidence of the victim if for reasons to be recorded it is satisfied the victim is telling the truth (*see Section 124 of the Evidence Act*).

Evidence was adduced showing that the complainant was born on 10th October 2003 and which therefore proved she was 12 ½ years at the material time. The element of her being a child hence incapable of consenting to a sexual act was therefore proved beyond reasonable doubt. For purposes of sentencing she fell in the age bracket provided under **Section 8 (3) of the Sexual Offences Act**. My finding however, is that save for proving that the complainant was a child and the fact that she was in fact defiled, the prosecution did not prove its case against the appellant beyond reasonable doubt. The trial Magistrate did not record his reasons for believing the complainant but on my part I have perused her testimony several times and on each occasion I found something that raised doubt in my mind that she was telling the truth. This is because she was very inconsistent and her evidence was contradicted by that of her mother (Pw2). For instance, while she alleged her house was 70 metres from the appellant’s and whereas she alleged not to have known him, she claimed to have known where he worked. How could she have known where he worked if she did not know him. She also referred to him as Musau yet that was not his name and no effort was made by the prosecution to make a connection of that name to the appellant whose name is Kiseve Martin Jackson. The other inconsistencies arise from her evidence that she went home crying, that she had blood on her dress and that she told her mother that someone attempted to rape her. This evidence was sharply contradicted by her mother who stated that she learnt about the incident from her husband when he called her to go to the police station. Concerning the material day, the complainant’s mother testified that she punished the complainant for arriving home late and that the complainant did not tell her what had happened. Another inconsistency was brought to light by the testimony of the investigating officer. The investigating officer (Pw3) testified that the complainant reported that the appellant had defiled her several times between 21st June and 24th June but the complainant did not disclose this to the court. If the complainant could lie that she reported the incident to her mother immediately whereas she did not and failed to disclose what she told the investigating officer to the trial Magistrate, then it is also possible that she lied about the identity of the perpetrator. She may also have been mistaken as she did not know the perpetrator well. In my view this is a case where an identification parade should have been conducted to confirm that the complainant was certain of the identity of the appellant as the person who defiled her. I am also compelled to draw an adverse inference from the omission of the prosecution to call one R. Whereas under **Section 124 of the Evidence Act** evidence of the complainant need not have been corroborated and **Section 143 of the Evidence Act** expressly provides that the prosecution does not require any particular number of witnesses to prove a fact, it is my finding that R was a crucial witness. The complainant alleged to have gone to the appellant’s house on several occasions with the said R and also claimed that the said R was standing outside the appellant’s house as he defiled her. It was therefore crucial to call this witness to confirm if this was true. R was also alleged to be the one who knew the appellant and her evidence would have gone a long way in confirming the appellant was the perpetrator. This is more so because of the inconsistency of the complainant’s evidence and the contradictions between her evidence and that of her mother. The omission to call R and failure to conduct an identification parade left gaps in the prosecution’s case which give rise to some reasonable doubt whose benefit I must give to the appellant. In the premises the appeal succeeds and his conviction is quashed and the sentence of imprisonment for twenty (20) years is set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

Signed and dated this 28th day of October 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered Electronically via Microsoft Teams on this 9th day of November 2020.

MARY KASANGO

JUDGE