



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 35 OF 2019

IAN BUNDI KIRUNJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. NJOKI KAHARA S.R.M,

dated 18th November 2019 at the Chief Magistrate's Court at Chuka in SO case No. 3 of 2018).

J U D G M E N T

The appellant was charged before the Chief Magistrate's Court at Chuka with the Offence of Defilement contrary to **Section 8(1) (3) of the Sexual Offences Act**. He was also charged with an alternative charge of indecent act with a child contrary to **Section 11(1) of the Act**. The appellant was convicted on the charge of defilement and was sentenced to ten years imprisonment. The appellant was dissatisfied with both the conviction and sentence and lodged this appeal which raises six grounds. These are:-

- 1. That the learned trial magistrate erred in both law on facts in convicting the appellant as the appellant was not allowed to cross examine witnesses during trial.*
- 2. The learned trial magistrate erred in law and fact in dismissing and or ignoring the defence raised by the appellant as it raised very pertinent issues.*
- 3. The learned trial magistrate erred in law and fact in convicting the appellant yet the appellant was not conversant with the language of the court.*
- 4. The learned trial magistrate erred in both law and facts in convicting the appellant as there was no corroboration of the complainant's evidence.*
- 5. The learned trial magistrate erred in law and fact in convicting the appellant on the weakness of the defence rather than the strength of the prosecution evidence.*
- 6. The learned trial magistrate erred in law and fact in finding that the case was established beyond any reasonable doubt.*

The appellant prays that the appeal be allowed, the conviction be quashed, the sentence be set aside and he be set at liberty.

- The appeal was canvassed by way of written submissions. The appellant filed submissions through his advocate Mungai & Kibiriri & Co. Advocates.
- The respondent opposed the appeal and in submissions filed by D.P.P asserts that they fully support the conviction and sentence meted out by the trial magistrate and urges the court to dismiss the appeal.
- The particulars of the offence are that on 14th January 2018 at [particulars withheld] village Murugi East Location within Tharaka Nithi County, the Appellant intentionally and unlawfully, caused his male genital organ namely penis to penetrate the female genital organ of a girl child aged 15 years old. The prosecution called five (5) witnesses in support of their case. The first witness JG told the court that on 15th January 2018 one parent went and informed him that her child had gotten lost. He investigated and came to learn that the child who is the complainant in this case was living with the appellant. He proceeded to the house of the appellant and on enquiry the appellant admitted

that the girl was there and that they had decided to live together. PW1 called the chief and they arrested the appellant and the complainant who was found inside the house in the bedroom. They took them to Chogoria Police Station. The complainant J.M.M (PW2) testified that she is a student in class 7 at M Primary School and is aged fifteen (15) years as she was born in the year 2003. Her testimony was that she knew the appellant as a motor cycle rider. On 14th January 2018 she met the appellant at 4.00 pm and went to his home. She was in company of one Gakii who was a relative of the Appellant. The complainant took Gakii home and as she was leaving the house the appellant called her. While in the house of the appellant he took her to his bed and removed all her clothes. The appellant also removed his clothes. They entered the bed and engaged in sexual intercourse for four times. She spent the night in the house of the appellant. The following day the appellant locked her inside the house. Later some people went to the house accompanied by the assistant Chief and took her to Chogoria Police station. Catherine Kaari Micheni the Assistant Chief Gantaraki Sub-Location (PW3) testified that she received a call from JG (PW1) informing her that the complainant was missing. They proceeded to the house of the appellant and found the complainant inside the house alone. She then proceeded to the home of Mbae where she met the appellant and corrected him. She took the two to Chogoria Police Station. The complaint was examined at Chuka District Hospital by Joseph Mwendu Mwirebu and a registered clinical officer at Chuka District Hospital. She testified that she examined the complainant on allegation that she had been sexually assaulted by someone known to her. According to her, nothing significance was seen at the time. The complainant had normal external genitalia and no spermatozoa was seen. PW4 testified that there was no evidence examination that the girl had been sexually assaulted. That the hymen was broken which was an indication that she could have engaged in sexual inter-course before.

4. No. 100764 P.C Miraj Suleiman (W5) is the officer who investigated the case. He took the complainant to the Hospital and a P3 form was filed. He then charged the appellant with defilement.

5. The court found that the appellant had a case to answer. He opted to give his defence on Oath and told the court that on the material day he saw the complainant being escorted by her friend to go home. They passed by his house. The next day the Assistant Chief arrested her alleging that he had defiled a girl. In cross-examination he admitted that he recorded a statement at the police station and stated that the complaint was in her house and had sexual intercourse with her that night.

6. In her Judgment, the trial magistrate found that the prosecution had proved the case against the appellant to the standard of beyond reasonable doubts.

7. The appellant in his submissions chose to concentrate on two grounds only. That is-

(a) The learned trial magistrate erred in law and fact in finding that the case was established beyond reasonable doubt.

(b) That the trial magistrate erred in law and fact in convicting the appellant on the weakness of the defence rather than the strength of the prosecution.

These two grounds can safely be considered under one heading, that is, whether the case was proved beyond any reasonable doubts. I have considered these grounds of appeal, the submissions and the proceedings before the trial court. This being the first appellate court, I have a duty and the appellant has a legitimate expectation that the evidence will be subject to a fresh evaluation and analysis by this court and an independent finding be reached. This was the holding in the case of Okeno -v- Republic 1972 E.A 32. This court will leave room for the fact that it did not have an opportunity to see the witnesses when they testified.

From the record, it is clear that the complainant was not willing to testify. She failed to come to court and the State had to apply for summons and even warrant of arrest. When she did turn up in court she was speaking slowly and the trial magistrate noted that – ***“The complainant herein is refusing to give evidence. I herein direct that she be detained at Meru Remand Prison for a further one month.....*** “See page 10 line 22-23 of the record.

8. When she came to court on 10th December 2018 she gave evidence and ended her story at the point that she was taken to Chogoria Police Station. The witness was not truthful. Although under **Section 124 of the Evidence Act** the evidence of the complainant could be relied on to convict the appellant; it fell short of the key requirement which is, ***“that the witness was telling the truth.”*** If a witness is not truthful, then, of necessity, her evidence requires corroboration for the court to be able to establish the fact. The prosecution did not adduce evidence to corroborate her testimony. This is because first of all the complainant did not adduce evidence that she was escorted to hospital, secondly, the doctor who allegedly examined her that is Joseph Mwendu Mwirebu (PW4) a registered clinical officer at Chuka District Hospital testified as follows:-

“ There was no evidence on examination that the girl had been sexually assaulted. The hymen was missing therefor it is possible she could have engaged in sexual intercourse before. The victim was brought to hospital on 15th January 2018 one day after the alleged sexual intercourse.”

See page16, 15-18 of the record.

The witness had examined the complainant and found that she had normal genitalia and with no bruises of laceration or discharge and no spermatozoa was noted. The medical evidence tendered by the prosecution failed to confirm that the complainant was defiled and her testimony on the fact of defilement was not reliable. In sexual offences, the evidence of the victim is crucial as it can be relied on to convict. The evidence must therefore be one that the court will be able to rely on without any doubt in its mind that it is the truth and nothing but the truth.

The appellant was charged with defilement contrary to **Section 8 (1) (3) of the Sexual offences Act**. The section provides:-

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) 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.”

On evaluating the testimony of the complainant and that of the clinical officer (PW4) it is my finding that there were serious doubts cast on the allegation of defilement.

9. The appellant has submitted that there are several issues which that came into question which raise doubts. On the issue of penetration he has submitted that it was not conclusive on the fact of penetration by the appellant. He relies on ***FO. -V- Republic (2020) eKLR*** where the court stated:-

“ Looking at the evidence of PW1 and PW2 and compared to that of PW4 and the P3 and PRC forms, I am unable to agree with the trial court that evidence conclusively proved defilement. It has been held couple of times that absence hymen is not proof of sexual activity as some children may be born without it or it may be lost because of reasons other than sexual intercourse.

39. In PKW – v- Republic (supra), Maraga and Rawal JJ (as they then were stated regarding absence of hymen:-

“[15]. In their analysis of the evidence on record, the two court below appear to have placed a high premium on the finding that child’s hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?

[16]. Hymen also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most case of sexual offences we have dealt with courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation inquiry , and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of Queen vs Manuel Vincent Quintanila (1999) AB QB 769...”

I am entirely in agreement with these findings. In this case the missing hymen was not associated with the current offence as the clinical officer was clear that the missing hymen was evidence that she could have engaged in sexual intercourse before. The trial magistrate at page 26 of the record found that there was no evidence that the complainant was sexually assaulted. She also found as a fact that the hymen was not intact and was not freshly broken. Her conclusion was that the complainant had engaged in sexual intercourse before with other men. The trial magistrate fell into error by arriving at such finding when there was no evidence to that effect and that the ruptured hymen could only be as a result of engaging in sexual intercourse.

10. The trial magistrate ought to have treated the evidence of the complainant with caution upon receiving the evidence of the clinical officer (PW4) as there was a high possibility that she was compelled to give evidence against her wish and when she did give the evidence it was simply to secure her released from prison. The finding by the trial magistrate was clear that she did not believe the complaint. There is nothing on record to show that trial magistrate cautioned herself. Her reason to doubt her credibility is not supported by the evidence on record. The trial magistrate also erred by arriving at conclusions which were not supported by any evidence. If I may quote page 26 from line 26 she states;

“ Being that the doctor stated her hymen was not intact and not freshly broken, then it means PW2 had engaged in sexual intercourse severally before with other men. If defilement was forced the doctor would have observed lacerations and bruises in her genitalia caused by accused while forcing his penis to penetrate. Failure to have had the said injuries infers that PW2 is used to engaging in sexual intercourse.....”

These were extraneous findings which were not supported by the evidence. Surprising she finds that penetration was proved base on the credibility of the complainant who she had to commit to prison for refusing to give evidence. The appellant was charged with defilement on a specific date. The prosecution had a duty to prove the charge and its particulars beyond any reasonable doubts. The prosecution did not discharge this burden. The trial magistrate erred by shifting the burden of proof on the appellant. The appellant had a constitutional right to be presumed innocent unless proved guilty ***Article 50 (2) (a)*** of the Constitution provides:-

***“ Every accused person has a right to a fair trial. Which includes the right-
to be presumed innocent until the contrary is proved.”***

It is not the duty of the court to prescribe a defence for an accused as he has a right to remain silent. The finding by the trial magistrate which is based on – The appellant did not specifically plead in his that he was deceived by either appearance or age of PW2 cannot be supported. I agreed with the defence that the issue of penetration was not proved beyond any reasonable doubts. The trial must have shifted the Burden of proof on the appellant to prove his innocence in criminal case. The Burden of proof never shifts.

In conclusion, I find that for the reasons which I have stated above, the appeal has merits. I allow it. I quash the conviction and set aside the sentence. The appellant shall be set at liberty unless he is otherwise lawfully held.

Dated, signed and delivered at Chuka via zoom this 10th day of December 2020.

L.W. GITARI

JUDGE

10/12/2020