



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL CASE NO. 112 OF 2008**

**BONIFACE OBIERO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara S/O Case No. 130 of 2018 delivered by Hon. of J.Kibosia, SRM on 15<sup>th</sup> May 2018).*

**JUDGMENT**

**Background**

1. The Appellant was charged with a main count of defilement contrary to **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act**. It was alleged that on 3<sup>rd</sup> August, 2016 in Industrial Area within Nairobi County, intentionally and unlawfully caused his penis to penetrate the vagina of EBO aged 8 years. In the alternative count he was charged with an indecent act with a minor contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006**. He was convicted of the main charge and sentenced to serve life imprisonment.

2. He appealed the decision being dissatisfied by both the sentence and conviction. The grounds were that the magistrate erred in failing to find that the elements of penetration and age were not proved, that there were contradictions and inconsistencies in evidence making the conviction unsafe, that essential witnesses were not called and that the defence was not considered.

**Submissions**

3. The Appellant relied on written submissions which he filed on 29<sup>th</sup> October, 2018. He argued that penetration was not proved because the P3 Form and medical report contradicted each other. He also relied on the witness testimonies of **PW3** and **PW4** who further compounded his assertions. He associated himself with the remarks of **PW4** who stated that the bruises noted on the minor's genitalia could have been necessarily as a result of defilement. He argued that identification was not demonstrated as the house **PW1** alleged to have been defiled was found to belong to a person other than himself.

4. He argued that the witness accounts contradicted the age of the minor, the date of the examination at the hospital and the identity of the perpetrator. He also argued that the prosecution failed to call vital prosecution witnesses. He pointed to the owner of the house, the elder sister who took **PW1** to hospital and finally Pauline who was accompanying **PW1** who witnessed the initial interaction with the Appellant. Lastly, he argued that the failure to consider his defence did not comply with **Section 169 of the Criminal Procedure Code**.

5. The Respondent through learned State Counsel, Mr. Momanyi conceded to the appeal. His view was that penetration was not established as no injuries were observed on the minor's genitalia and the hymen was found intact. He also concurred with the Appellant that there was failure to call crucial witnesses namely Pauline, **PW1's** friend who was in her company when the Appellant called her as well as the owner of the house where the defilement took place. He also conceded that there were contradictions between the evidence of **PW1** and **PW2**. He urged the court to allow the appeal.

**Evidence**

6. It is now the duty of this court as a court of first appeal to reevaluate the evidence and come with an independent conclusion. See **Pandya vs. R (1957) EA 336, Ruwala vs. R (1957) EA 570**. **PW1** a minor aged 10 years gave an unsworn testimony. She testified that the Appellant accosted her as she handed him a voice and data voucher he had sent her for. Earlier, the Appellant called **PW1** whilst she was in the company of her friend one Pauline after which he sent her to the shop to buy air time. He then proceeded to defile her and she went home after the incident and only reported to her sister a day after. She testified that her sister took her to hospital and they went to a police station

in the company of both her father and sister. **PW2, H O O** was the father to PW1. His evidence was that he on 15<sup>th</sup> September, 2016 when he went home found that PW1 had been taken to hospital by her sister. He learnt in the evening after they returned that the issue with PW1 was defilement. He reported the matter to the village chairman and was referred to the police station. His testimony was merely that PW1 identified to him the house in which she was defiled. The police accompanied him and PW1 to the said house. They found the owner of the house in it whom PW1 said was not the defiler. Thereafter, the owner of the house led them to where the Appellant lived and he was arrested after he was identified by PW1.

7. **PW3, Dr. Maundu** of police surgery examined PW1 on 5<sup>th</sup> October, 2017 and filled a P3 Form adduced as Exhibit 1. The findings were that there were no injuries, the hymen was intact with smooth margins and there was no discharge. He stated that there were no signs of defilement. **PW4, Bessy Njoro** testified that **PW1** was born 17<sup>th</sup> October 2005. She examined the minor, on 16<sup>th</sup> September 2016. Her examination was borne on a medical summary sheet produced as exhibit 2 (a) and a PRC Form produced as exhibit 3. **PW4** noted no physical injuries but there were bruises on the labia minora. The report showed that there was whitish discharge. Her testimony was that the bruises could have been occasioned by an infection, scratching or defilement.

8. The Appellant gave an unsworn defence. He stated that on the material day he went to work as a laborer at a construction site. He stated that afterward he headed home as was the routine. He stated that he was arrested and accused of defilement after he was pointed out by **PW1** who was at the time in the company of **PW2** and a police officer.

### Determination

9. After considering the evidence on record and respective rival submissions, I have come to the conclusion that the court is enjoined to determine; (i) *Whether the charge was at variance with the evidence adduced, (ii) Whether the offence of defilement was proved beyond a reasonable doubt, (iii) whether the prosecution failed to call crucial witnesses, and (iv) whether the Appellant's defence was considered.*

10. The first issue for determination arises from this court's observation that the dates indicated in the charge sheet regarding the date the offence was committed is at variance with the evidence adduced by PW1. In the charge sheet it was indicated that the offence occurred on 3<sup>rd</sup> August, 2016 whereas the evidence of PW1, the victim, was that the offence was committed on 3<sup>rd</sup> September, 2016. A closer scrutiny of the hand written proceedings confirms that the date of 3<sup>rd</sup> September, 2016 was confirmed by the trial magistrate and counter signed. At that point the prosecution ought to have amended the charge sheet to reflect the correct date of defilement. It can safely then be concluded that the charge sheet was not supported by the evidence adduced.

11. Be that as it may, if the court hereafter in this judgment finds that the complainant was defiled and that the Appellant was culpable the defect can be cured by ordering a retrial. I say this because the complainant was a minor and may have been confused of the dates that the offence took place. In such a case therefore, an order for a retrial would serve the best interests of justice as opposed to aiding the prosecution to fill gaps in its case. I will therefore tie this issue alongside the next, which is whether the offence was established.

12. In a case of defilement the prosecution is enjoined to prove three key elements, namely; (i) penetration, (ii) age of the victim and (iii) identification of the assailant. As regards penetration, PW1's testimony was that the Appellant lured her into his house when she returned to him after shopping for him airtime. The evidence available was that she reported the incident to her sister on the following day. The first examination was done at Makadara Health Centre by PW4. Her evidence was that she reported to the Hospital on 16<sup>th</sup> September, 2016 at 11:30 am. She testified that PW1 did not give the exact date of the offence save that it happened at Mukuru Kayaba. This date is confirmed by the medical summary sheet from the clinic as well as the PRC form. It implies that if the offence was committed on 3<sup>rd</sup> September, 2016, PW1 was first examined almost two weeks thereafter. It also would imply that if the offence was committed on 3<sup>rd</sup> August as stated in the charge sheet, PW1 was first examined one and a half months later. In my view then, PW4 having failed to state the approximate age of the bruises on the labia minora would vindicate her position on cross examination that the bruises may have been occasioned by an infection, defilement or scratching. The evidence of PW3, Dr. Maundu, who examined PW1 on 15<sup>th</sup> October, 2017 noted no injuries both physical and on the genitalia, an intact hymen and no discharge.

13. Whereas the lack of injuries as observed by this doctor could be explained by the time lapse between the date of the alleged defilement and the date of the examination the entire incident is shrouded with unclear circumstances. The crucial one being that crucial witnesses who would have filled the gaps to affirm that indeed PW1 was defiled on either the date on the charge sheet or the day she testified were not called.

14. One of those witnesses is the sister to PW1 who it is said she reported the incident to on the day after the incident. Her evidence was so crucial that she could have confirmed that PW1 reported the incident almost immediately after and that she actually took PW1 to hospital. She also probably could have explained the failure to take her to hospital after the incident.

15. The other crucial witness was the alleged owner of the house where the incident purportedly took place. His evidence was too vital in the sense that, firstly, he would have given the link of the house to the Appellant, and secondly, how and what led to the arrest of the Appellant. In the absence of such evidence it begged how it could be confirmed that the defilement took place in the house of a person the police did not bother to arrest or call in evidence to incriminate the Appellant.

16. Other vital witnesses were either the arresting or investigating officer. It is only through their evidence that light would have been shed, firstly, on the inconsistency of the date of the offence, secondly, what informed the arrest and subsequent prosecution of the Appellant, and thirdly, why it took too long to take PW1 to hospital.

17. Another vital witness was one Pauline who PW1 it is said was her friend and was in her company when the Appellant lured her into his house. This witness in the view of the court was the only person who would have aided in a positive identification of the Appellant; specifically that the Appellant is the one who took her to the house she alluded the defilement took place. The failure to adduce such

evidence means that it could not be established that it was the Appellant who defiled her in the said house and therefore his identification was without error.

18. In the absence of the above vital witnesses the court is unable to make a conclusion that the Appellant was linked to the offence. Therefore, even if he was arrested consequent to the alleged identification by PW1, it is difficult to state that the identification was without error for the foregoing reasons. Additionally, although the age was established by oral evidence, other ingredients of the offence having not been proved beyond a reasonable doubt the court cannot make a finding that the Appellant was culpable and that the conviction was therefore safe.

19. The court is alive to the proviso to Section 124 of the Evidence Act. This provision empowers the court to convict an accused person in a case of defilement if the court believes that the minor is telling the truth, lack of corroboration notwithstanding. In the present case though, the prosecution's case lacked very vital evidence that would have convinced the court that the minor spoke the truth. Those gaps placed a doubt in the mind of the court, firstly that the minor was defiled, and secondly, that even if she was defiled the person culpable was the Appellant. The benefit of the doubt must be accorded to the Appellant.

20. In view of the foregoing, I find that the prosecution did not prove its case beyond a reasonable doubt. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held.

**DATED and DELIVERED** this 4<sup>th</sup> day of **March, 2019**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Appellant in person.*
2. *Miss Atina for the Respondent.*