



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 20 OF 2017

JOSEPH WAMBUGU MUTAHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from both conviction and sentence arising from the Judgment of Hon. J. Wambilyanga SRM delivered on 26th April 2017)

JUDGMENT

The appellant was charged with defilement contrary to Section 8(1)(3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that on the 8th day of October, 2014 at around 05.30hrs in Tetu Sub County, Nyeri, County, the Appellant intentionally caused his penis to penetrate the vagina of MMK a child aged 15 years.

In the alternative the Appellant was charged with committing an indecent act with a child contrary to Section 11 (1) of the Section Offences Act No.3 of 2006. The particulars of the offence are that on the 8th day of October, 2014 at around 0530 hours in Tetu Sub County, Nyeri County, the Appellant intentionally touched the vagina of MMK a child aged 15 years with his penis.

The Appellant pleaded not guilty to both the main charge and the alternative charge. The prosecution called 5 witnesses and the Appellant gave a sworn evidence. The judgment was delivered on 26th April 2017 in which the Appellant was found guilty of the main charge was convicted. He was sentenced to serve 20 years in jail.

Being dissatisfied by the said judgment the Appellant instituted the instant appeal against both the conviction and the sentence on the following grounds:-

- a) That the learned Magistrate erred in law and fact in failing to consider that the prosecution did not prove penetration.*
- b) That the learned Magistrate erred in law and fact as the recognition of the perpetrator was not clearly brought out during the trial.*
- c) That the learned Magistrate erred in law and in fact in relying on the evidence on record despite the glaring inconsistencies and that it was not corroborated*

The Appellant relied on his written submissions dated 16th November 2018 and oral submissions made by his counsel Ms. Wangari. The prosecution responded through Mr. Magoma prosecuting counsel, who also reiterated the evidence of key witnesses who testified for the prosecution.

The Appellant's case

The Appellant submitted that there was no proof of penetration arguing that it was evidenced by the absence of treatment notes by the doctor and the investigation officers; absence of spermatozoa during examination; failure to link the infection caused by yeast cells to the Appellant by failing to have him tested. The Appellant relied on **George Muchika Lumbasi vs Republic Kakamega Criminal Appeal No.17 of 2016; Joseph Maina vs Republic [2016] eKLR** and **Miriti Kanampiu vs Republic [2013]eKLR**.

He submitted that prosecution relied on dock identification; that the complainant identified him on the dock; that PW3 and PW5 did identify him Appellant. That by virtue of her evidence that she was grabbed from the back she could not have seen her assailant.

He pointed out the inconsistencies in the prosecution evidence.

The Respondent's case

The prosecution in submission highlighted its case. That according to PW1 the incident happened at 5.30 am when she was going to school. The Appellant strangled her, covered her mouth and forced her into the forest where he defiled her.

That she identified that appellant by recognition because he used to sell milk. That her mother PW2, confirmed that the complainant went home crying at 6.am with her clothes dirty and blood stained clothes and without no shoes. That PW3 confirmed that they found shoes and lessso at the scene.

Further that PW4 the medical officer's testimony was that the complainant was 15 years at the time of examination. She had muddy clothes and some stains resembling blood seen on her uniform. She had a bruised vagina and the hymen was perforated.

Issues for determination

a) Whether the Appellant was properly identified

b) Whether the offence of defilement under Section 8 (1)(3) of the Sexual Offences Act was proved to the required standard

a) WHETHER THE APPELLANT WAS PROPERLY IDENTIFIED

The Appellant submitted that he was not properly identified. He stated that the circumstances would not have allowed the complainant to identify him.

The testimony of the complainant was that on 8th October 2014 she was going to school at 5.30am in the morning. She states:

"I saw a male person. He saw me. He was someone known to me. He strangled me and closed my mouth with his hand. He pulled me to the thicket. He took my lessso and close my mouth. He threw me down and slept on me. He removed my clothes. He removed my panty only. He inserted his penis into my private part. Later my vagina I felt pain. He left. I left and met my fellow student. They escorted me upto Gachatha. I went home. We had a funeral at home. I went to the funeral and told my auntie. My mother was called by my uncle and she fainted. I went to the police with my uncle and cousin W. We reported. We went back to the scene with the police. I had left my shoes, panties and lessso. We found the things already taken by the JN who is my uncle. He is a neighbour we met with them and they said they took. I went with my uncle to Provincial General Hospital Nyeri. I was treated and told to go another day. I was later given a P3 at Giakanja police which are filled at the hospital MFI 2. This are the shoes I was wearing plus my panty and lessso. He was somebody I had seen. He used to sell milk. He is the one at the dock. My birthday is 24.4.1999. This is my birth certificate. It has my name, my parent's name and it shows my date of birth."

On cross examination she told the court that she saw a man. And after she and the man passed each other and he followed after her. She said when she recorded her statement she told the police it was someone she had seen before. He held her throat and closed her mouth.

When she got home, her clothes were covered with soil, her mouth was swollen, she had blood on her clothes and had no shoes. She told PW2 LW that 'she was caught by somebody she did not know but could identify him' they went to the police then to the scene where they found her panty, lessso and shoes. That the accused came there and told them he had heard screams.

On re-examination she said that she had recorded a statement. That she had not recorded that the complainant's mouth was swollen or she had blood on her clothes.

PW3 JN was with PW2 when the child got home. He left them to go to the police. He went with one James Ngure to look for the child's shoes, panty and lessso. They found everything except the panty. They proceeded to the police station. They met Wambugu who was asked by Ngure whether he heard screams. He responded that he heard and saw four people leaving. That he told them where the clothes were. That police came with the complainant to the scene.

Dr. Mary Wanjiku Njuguna testified and produced the P3 on behalf of her colleague who examined the complainant. The P3 showed that she came in muddy clothes, stains resembling blood on her school dress, bruised lower lip, muddy feet, bruised vagina, hymen perforated, whitish discharge, pain full knees.

On cross examination she said the history showed that she told the police she did not know the assailant, that the complainant was found to have a yeast cell infection, that accused was not examined.

PW5 was no 69809 PC Paul Kibenei, at the material time was on general duties at Giakanja Police Post. He received the report that the complainant was accosted by a black stout man she always saw on her way to school. That this man dragged her into a bush and defiled her. That she managed to escape, went, boarded a matatu to Kwa Joseph village where her mother was attending a funeral. That after receiving the report he proceeded to the scene where he found that her relatives had collected the items which had been left there. The officer testified and I quote

"It was before 8.00am and while at the scene I found her family members who had collected some of her items which she had left at the scene. There was a pair of lessso and a pair of shoes black in colour which were at the scene. While at the same scene one male by the name Njau told me that as he went earlier at the scene he met Wambugu who told him that he had seen a pant in a thicket. The said Wambugu live 100m from the scene. I told him to call the said Wambugu who came to the scene and he took me to where

the pant was hidden in a thicket. The complainant on seeing the accused started crying and told me that he is the same man who defiled her. I interrogated the accused and escorted him to Giakanja police post. While at Giakanja police post he did record a statement and told me that he was within the scene and only heard a girl shouting for help. After investigations and after issuing a P3 form to the complainant, I charged the accused for the offence before court. The lessso is before the court. It is muddy stained – the same is produced as P Exhibit 2a and the pants as P Exhibit 2b and the shoes as P Exhibit 2c. I have a copy of the complainant’s birth certificate. She was born on the 26.4.1999 by then she was 15 years

Copy of birth certificate produced as P Exhibit 3.

The accused is the one in the dock. The complainant came to the station with the cousin by the name W. The accused grabbed the complainant from behind. That is all.”

On cross examination he said that the complainant told him that she was accosted by a man she always saw on her way to school. Shown his statement he confirmed that that piece of information was not in the statement. He also confirmed that it was not in his statement that the complainant told him that she was defiled but managed to escape. He stated that she told him that whoever accosted her grabbed her from behind. She told him that she was trailed from behind. That the man had already passed her when it happened. That she screamed for help. He only recovered the pant. He said he did so with the help of the accused person. He did not verify whether the complainant was wearing pants when she reported. That the accused recorded a statement in which he stated that he heard screams. That he suspected the accused to be the perpetrator because it was suspicious how he had seen the pants hidden in a thicket at that given hour.

The accused person testified in his defence that indeed he was a dairy farmer and he sold milk. On the material date he went to sell his milk at 6:00am. On his way home he saw a pant on the road side. He told his neighbour one Ngari what he had seen. This is because Ngari was saying that a child had been defiled that morning along that way. He denied having met any child on that road that morning. He said he was called from home by Ngari, and arrested by officers from Giakanja police station. He said he did not know the complainant and had never seen her before.

On cross examination he said that he took milk for sale at 6:45 am. That there were other people on the road that morning but he was the only one who was arrested.

In her judgment delivered on the 26th April 2017, the trial magistrate rejected the appellant’s defence, found him guilty of defilement, convicted and sentenced him to 20 years’ imprisonment.

On the issue of identification, the trial court was of the view that the complainant recognized the appellant stating:

“In this particular case, I am satisfied that the complainant knew the accused person well by the fact that she was always seeing him on her way to school. I have also gone through the evidence and noted that the minor was cautioned and underwent a voire dire examination, her evidence was not shaken even during cross-examination, in light of proviso to Section 124 of the Evidence Act CAP 180, I find that it was not necessary that her evidence be corroborated...”

Is this finding supported by the evidence?

The complainant’s description of the assailant is found in her testimony where she describes him as *a male person...somebody she had seen...he used to sell milk... the one in the dock*. These are the descriptions that she gave on oath. There is nothing to show that she gave any description to the police. Or that she actually said that the assailant was somebody she used to see every day on her way to school. She said it was somebody she had seen. In her own testimony she does not say where she saw this person or the period of time she had ‘known’ him. Hence the finding that it was somebody she knew used to see on her way to school is not supported by her own testimony.

The police officer said that she described the attacker as a short stout man. There was no such description in her own testimony.

He also said that she identified the accused at the scene. That when the accused was called to the scene, the complainant saw him and began to cry saying that he was the one who had defiled her. Nowhere in the complainant’s testimony did she say that she identified the attacker at the scene. It was also not in the police officer’s statement that the complainant had identified the accused at the scene. Neither did her mother nor her uncle who were at the scene state that the complainant identified the appellant at the scene. In fact, from the totality of the evidence is that the complainant did not know the accused to be able to recognise him as alleged.

The manner in which the offence was committed also created circumstances that would make identification or even recognition possible without any additional information. It was 5:30am in the morning. The question of the amount of light arises. How much light was there? The attacker approached from behind. That is the complainant’s testimony. That the man she saw by passed her then she was attacked after the man had passed. The police officer stated in examination in chief and in cross examination that she told him she was attacked from behind. How then did she identify the attacker? The police officer relied on the accused person’s statement that he saw a panty on the road side and told a neighbour about it. That the fact that he saw panty in a thicket at that hour was suspicious. That begs the question his suspicion was sufficient to amount to circumstantial evidence strong enough to support a conviction?

The appellant was arrested the same morning of the defilement. I note that apart from the arrest no investigation was conducted to connect him with the defilement. He was not taken for medical examination. His clothes were not collected for checking whether they could have any clues to the attack e.g .unexplained mud. The appellant did not deny that he used that road to go to sell his milk. But did he commit the offence?

c) WHETHER THE OFFENCE OF DEFILEMENT UNDER SECTION 8 (1)(3) OF THE SEXUAL OFFENCES ACT WAS

PROVED TO THE REQUIRED STANDARD

Section 8(1) of the Sexual Offences Act provides: -

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

Section 8(3) of the Sexual Offences Act provides: -

“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.”

Penetration has been defined by section 2 of the said Act to mean: -

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

The ingredients of the offence of defilement are therefore age, penetration and identification. Identification has already been dealt with above. Age is not contested. The record also confirms that the complainant adduced her birth certificate as MFI3 which proves that she was born on 24th April 1999 and at the time of the offence on 8th October, 2014 she was a minor aged 15 years.

In Mark Oiruri Mose vs R [2013] eKLR the Court of Appeal stated thus:-

“...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ....” (emphasis mine).

In Aloyo Ewoi v Republic [2017] eKLR it was held: -

“The penetration for the purpose of proving an offence of defilement does not have to be complete or result in ejaculation of spermatozoa to amount to penetration envisaged in section 8(1) of the sexual offences Act. Prove of even partial penetration would be enough to prove penetration. Penetration can be proved by direct evidence of the complainant and/or by medical examination. The fact that there was no evidence of spermatozoa in the vagina of the complainant when she was examined the next day does not necessarily mean that there was no penetration”

It is not necessary that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.

To demonstrate this ingredient, the complainant testified how the attacker removed her pant and inserted his penis into her private part. PW4 a medical officer testified that she found on examination that **She had a bruised vagina fole. Hymen was perforated.”**

Based on the testimony of PW1 and PW4 the ingredient of penetration was safely proved. There is no doubt that the complainant here was defiled. Her testimony is sufficient together with that of the medical officer.

However, there is doubt as to whether the appellant was properly identified. The trial magistrate erred in arriving at the conclusion that the appellant was known to the complainant before the commission of the offence yet there was insufficient evidence. It could not have been a case of recognition. It was imperative that a proper identification be carried out.

Hence, I have no doubt that the complainant was defiled. However, the evidence of identification did not reach the required threshold beyond a reasonable doubt.

On the foregoing grounds the appeal succeeds. The conviction is quashed, the sentence is set aside and the accused is at liberty unless otherwise legally held.

Dated, delivered and signed at Nyeri this 1st day of March 2019.

Mumbua T. Matheka

Judge

In the presence of: -

Court Assistant: Juliet

Ms. Jebet for state

Accused –present

Ms. Wangari for appellant

Mumbua T. Matheka

Judge

1/3/19