REPUBLIC OF KENYA

CORAM: R.E. OUGO J

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 99 OF 2018

NURICK OMBUI NYASIMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of Hon. J.K. Mutai Resident Magistrate

delivered at Ogembo Law Courts on 19th October 2018 in SRM S.O. No. 69 of 2017)

JUDGMENT

1. The appellant **Nurick Ombui Nyasimi**, was charged with the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006 on the main count. He was also charged with committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act in the alternative. The appellant was convicted and sentenced on the main count whose particulars are that on 22nd April, 2017 at around 1400 hours in [particulars withheld], Sameta sub-county within Kisii County, he intentionally and unlawfully caused his penis to penetrate the vagina of **HNM** a child aged 12 years.

2. Being aggrieved by the decision of the trial court, the appellant has preferred this appeal against both conviction and sentence. The grounds of appeal which were set out in his petition of appeal were canvassed by way of oral and written submissions.

3. At the hearing, of the appeal Mr. Nyatundo, counsel for the appellant submitted that PW1 in her testimony had not described the manner in which she was defiled. He submitted that there was insufficient proof of penetration as PW 1 had not specified whether the penetration was anal or vaginal and that the trial court had proceeded as if it had been established that the penetration was vaginal. He submitted that PW1's evidence had needed corroboration and that the medical evidence tendered in support of her testimony had also been contradictory as the P3 form did not indicate that the hymen was broken, yet the PRC indicated the hymen was broken.

4. Counsel further argued that the indication that the hymen was broken had a different connotation from an indication that the hymen was absent as had been indicated in the PRC form. He contended that the anatomical abnormality where one was born without a hymen had not been ruled out in the complainant's case. Counsel submitted that the fact that there had been no observation of spermatozoa coupled with the fact that the complainant did not describe the manner of penetration went to show that the appellant had been framed for the offence. He also submitted that the prosecution had not ruled out a case of consensual sex.

5. In response, Mr. Otieno counsel for the state submitted that absence of the hymen did not rule out the fact of penetration, as partial penetration of the male sexual organ with the female organ could suffice. He submitted that PW 2 had observed vaginal penetration and the P3 form had indicated that there were vaginal bruises and the probable weapon being the penis. Therefore, whether or not the hymen was present was immaterial and its omission from the P3 form could not diminish the fact that penetration had been proved. He further submitted that the complainant had recounted the appellant's actions in Kiswahili which the trial court had translated and recorded as defilement.

6. Mr. Nyatundo further submitted that according to PW 1 she had spent the night after the offence at her grandmother's place and told her parents about the incident the following day. Counsel submitted that the trial court erroneously introduced nonexistent evidence in its decision, when it stated that PW1 had told her grandmother about the incident and that her grandmother had taken her to hospital. He also argued that the failure to call PW1's grandmother as a witness amounted to concealment of material facts as she would have shed light on the physical state of PW1 after the incident. He argued that a failure to call her as a witness could be construed to mean that her testimony would

have been adverse to the prosecution's case in accordance with section 119 of the Evidence Act. He relied on the case of **Bukenya v Republic** in support of this argument.

7. Counsel for the prosecution conceded that PW 1 had not testified that she had informed her grandmother about the incident as had been indicated by the trial court. He however pointed out that the grandmother was not a crucial witness and calling her to testify would not have added any value to the prosecution's case.

8. Lastly, the appellant's counsel submitted that the trial court did not give due consideration to the appellant's defense. He submitted that PW1 had testified that the appellant had sent her to call his wife at the church and it was improbable that the appellant would have defiled the complainant and left her in his house while expecting his wife. He further submitted that the appellant's defense that he did not know the minor was reasonable and that the trial court had not given a reason as to why it had declined the appellant's evidence that there existed a land dispute which had led to the tramped up charges.

9. Counsel for the state countered that stating that there was no evidence that the appellant's wife was close by at the material time and suggested that the appellant had sent the complainant to the church to confirm his wife was not around, giving him the opportunity to defile her. As for the appellant's alibi witness, counsel submitted that it had been raised for the wrong date since the crime had occurred on 22nd April 2017. He urged the court to dismiss the appeal and uphold the sentence which was the minimum prescribed by law for the offence.

10. As this is a first appellate court, this court is required to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that it did not have the opportunity to see and hear the witnesses and so could not comment on their demeanor. I must also make my own conclusions , make my findings and draw my own conclusions (*See **Kiilu and Another V. R (2005) 1 KLR 174**)*

11. At the trial court the prosecution called 5 witnesses in support of its case whereas the appellant gave sworn testimony in his defense. The first prosecution witness was the complainant. She gave sworn testimony after the trial court confirmed that she understood the nature of an oath and the obligation to tell the truth HNM narrated how on 22nd April 2017 at about 2 p.m. she was preparing to go visit her grandmother when she met the appellant on the way. She testified that she knew the appellant as they both attended the same SDA church. He asked her to get on the motor bike he was riding saying that he would take her to church. He parked the motor bike a few paces from the church and asked her to go in and call Kemunto. That when they got to the appellant's house, he requested her to assist him move a seat, he then picked her up, placed her on a three-seater seat, removed his clothes and defiled her. She testified that he did it for ten minutes and that she resisted and screamed but it was raining and nobody could hear her. He left PW1 in the house, took his motor bike and went away. PW1 went to her grandmother's house spent the night and informed her mother, PW 3 about the incident the following day, who took her to hospital the same day. She was then taken to Itumbe police station where she recorded her statement and had her P3 form filed.

12. PW3 testified that on 23rd April, 2017 PW1 went to her shop and told her that the previous day, she had met the accused on her way who had taken her to his house and defiled her there. PW 3 knew the appellant as he was a neighbor. When she called him, he admitted to having done it and asked her not to inform his wife. She took PW1 to Bomachoge Chache sub county hospital where she was treated and reported that matter to the police station, where they were issued with a P3 form which was filled in by a doctor. She also stated that PW 1 was 12 years of age.

13. PW 4 recalled that on 23rd April, 2017, he received a call from his sister in law that her daughter PW1 had been defiled by the appellant. He advised her to take PW 1 to the hospital and followed them there. They were referred back to hospital on 24th April 2017 for further examination and recorded their statement at the police station the same day.

14. The clinical officer, PW 2 testified that PW1 went to the hospital on 23rd April 2017, having been defiled by a person known to her. The medical examination revealed that her hymen was broken and she had bruises in her vagina. The lab test only showed epithelial cells but no spermatozoa were seen. Nothing was detected on urinalysis and a HIV test and pregnancy test also came up negative. He stated that when PW1 was examined, she had already changed her clothes and had taken a bath. The PRC form and outpatient card were used to fill in the P3 form. He testified that later on the appellant had been brought to the facility experiencing pain on the head, hand and buttocks after being subjected to mob justice.

15. The investigating officer (PW5) confirmed that PW1 reported the incident to Itumbe police station on 23rd April 2017. She testified that she had recorded their statements and had accompanied them to hospital. Since there was no electricity, they were advised to go the following day. She issued an order for the arrest of the appellant who was only found and arrested on 30th October 2017. She produced a copy of the minor's birth certificate.

16. When put on his defense, the appellant denied knowing the complainant and testified that on 23rd April 2017 he was attending to his errands in Kisii town. He denied that he had defiled the minor and testified that PW 3 and PW 4 had a land dispute with him at a family level.

17. From the foregoing, the following are the issues for determination by this court:

a. Whether there was insufficient proof of penetration of the minor by the appellant;

b. Whether the prosecution’s failure to call the complainant’s grandmother amounted to concealment of material fact; and

c. Whether the trial court erred in disregarding the appellant's defense.

18. The appellant has been charged with the offence of defilement contrary to **section 8 (1) (3)** of the **Sexual Offences Act** which provides:

8 (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.

19. From the above cited provision, penetration is one of the essential ingredients to be proved in a case of defilement. Penetration is defined in **section 2** of the Act as *"the partial or complete insertion of the genital organs of a person into the genital organs of another person*." Section 2 of the Act defines genital organs to include the whole or part of male or female genital organs and the anus.

20. In this case the complainant recounted the manner in which the appellant defiled her as follows:

"We went inside and he told me to move a seat in his sitting room. He lifted me up and placed me on a three seater seat. He removed his clothes. He defiled me. I resisted and screamed but it was raining, nobody could hear me. He did it for about ten minutes. I felt hurt. He left me in the house, took his motorbike and went."

21. The appellant contends that the absence of spermatozoa in the complainant's genitals and the absence of complainant's hymen did not amount to proof of penetration. He also stated that there was a contradiction between the PRC form which indicated that the hymen was absent yet the P3 form did not contain that information. On these issues the Court of Appeal had this to say; in the case of ***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"

22. On the issue of the hymen the Court of Appeal in ***P. K.W VS Republic [2012] Eklr*** stated:

"15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?

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 cases 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 injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769."

23. As the courts have stated absence of spermatozoa does not disprove the fact of penetration as much as the absence of the hymen proves it. What is required of the prosecution is cogent, consistent and reliable evidence to prove the offence. The oral evidence of the victim and circumstantial evidence may provide decisive proof of the crime of defilement. (See ***Martin Nyongesa Wanyonyi vs Republic Criminal Appeal No. 661 OF 2010 [2015] eKLR***). In the present circumstances, I find that there was adequate proof of penetration. PW1 though the only witness her description of her ordeal was vivid and consistent. She testified that she was hurt after the act was especially crucial in proving penetration. To corroborate her evidence, the prosecution adduced medical evidence. PW2, the medical officer testified that the complainant was examined the day after the incident had occurred and was found to have bruises in her vagina. The examination also revealed that her hymen was broken and epithelial cells were also observed. PW 2's evidence was clear that there had been penetrative, unprotected vaginal sex. The omission of the observation that the hymen was broken in the P3 form did not diminish the fact of penetration, which I find was sufficiently proved.

24. Turning to the second issue, the appellant has invited this court to draw a negative inference from the failure of the prosecution to call the complainant's grandmother as a witness. **Section 119** of the **Evidence Act** provides:

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

25. In the case of ***Bukenya and Others V Uganda [1972] EA 549*** which was relied upon by the appellant, *th*e Court of Appeal for East Africa stated as follows -

"It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence that is adequate and it appears that there were others witnesses who were not called, the court is entitled, under the general role of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."

26. On this issue the Court of Appeal in the case of **Mwangi versus R. [1984] KLR 595** held as follows:

> "*Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."*

27. It is argued that the grandmother would have testified about the condition of the complainant after the incident to rule out the possibility that the complainant engaged in consensual sex that night. I find this argument by the appellant purely speculative as there was nothing on record to support this contention. It is a well settled principle that *he who alleges must prove.* The appellant did not provide proof to support his assertions. The complainant testified that after the incident, she had gone to her grandmother's home then confided in her mother PW 3 about the incident the following morning. As observed by both parties, the record does not state that the complainant informed her grandmother about the incident it is therefore clear that the grandmother would not have had added any value to the prosecution's case. The evidence adduced was sufficient. Moreover ***Section 143*** *of the* ***Evidence Act*** *provides that:*

> "*No particular number of witnesses shall, in the absence of any provisions of law to the contrary be required for the proof of any fact."*

28. The appellant also claimed that there were contradictions in the prosecution's case which the trial court disregarded in finding the appellant guilty. From the record, it can be seen that the witnesses' testimonies on when the complainant visited the hospital and on when they recorded their statements varied. For instance, PW 1 stated that she visited the hospital on 24th April, 2017, PW 2 stated that she visited the hospital on 23rd April, 2017 whereas PW 3 testified that they went on 23rd April, 2017, 24th April, 2017 and on 28th April, 2017.Further the evidence adduced by PW1 and PW3 was that it is PW3 who took PW1 to hospital and not the grandmother. In my opinion these variations did not go to the root of the matter to warrant interfering with the trial court's findings. (see ***Philip Nzaka Watu v Republic Criminal Appeal No. 29 of 2015 [2016] eKLR)***

29. Lastly, the appellant argues that his defense was not fully considered by the trial court. In dismissing the appellant's defense the trial court stated that the appellant could not claim to have only seen the complainant in court and allege in the same breath that her family and his had a longstanding land dispute. I concur with the trial court's finding that the appellant and the complainant were not strangers and that she recognized him as they both attended the same church. PW 2 also confirmed that she was familiar with the appellant who was a neighbor.

30. The appellant testified that on 23rd April, 2017 he was in Kisii carrying on his errands and did not defile the complainant as claimed. As submitted by counsel for the respondent, the appellant's alibi was raised for the wrong day. According to the investigating officer, they lost track of the appellant after the incident on 22nd April 2017 and they were only able to arrest him in October2017 after he had been lynched by the public. His actions of moving from the locality so soon after the report was made worked against his claim of innocence. I also find the appellant's argument that his wife was in the vicinity at the time of the alleged offence and that it was inconceivable that he would have defiled the complainant while expecting her pure conjecture. This aspect was not brought out during the hearing of the matter and cannot be introduced at the appeal stage.

31. In considering an alibi defense, the court is bound to weigh the evidence adduced in totality and make a finding on the culpability or otherwise of the accused even where the accused does not call a witness. *(See* ***Wangombe –Vs. - Republic (1976 – 80) 1 KLR 1683****).* When weighed against the prosecution's case, I find that there was sufficient evidence to prove the offence. All three ingredients of the offence including recognition of the appellant, penetration of the victim by the appellant and the age of the victim were proved by the prosecution beyond reasonable doubt.

32. I therefore find that the appeal is devoid of merit and is dismissed and the impugned conviction and sentence affirmed.

Dated, signed and delivered in Kisi on this **3rd** day of **April 2019**.

R.E OUGO

JUDGE

In the presence of;

Appellant Present

Mr. Nyatundo For the Appellant

Mr. Otieno Senior Prosecution Counsel Office of the DPP

Rael Court Clerk