REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL NO. 112 OF 2017

SIMON EKAREDI OMOTO.....APPELLANT

-vs-

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Kiambu criminal case No. 39 of 2016. By Hon. B. Khaemba Senior Resident Magistrate.)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to **Section 8(1) as read with Section 8(3) of the Sexual Offence Act**. The offence is stated to have been committed on the night of 5th and 6th November, 2016 at Kiambu County upon one RWA, then a child aged 12 years. Upon full hearing the trial Magistrate found the Appellant guilty and sentenced him to serve twenty years imprisonment on the 30th August, 2017.

2. The appeal is against both the conviction and sentence. In his amended petition of appeal filed on the 20th September 2018, several grounds are stated that

(1) Conviction was against the weight of evidence

(2) Conduct of victim was of an adult

(3) Defence of alibi not considered

(4) Inconsistencies and contradictions in the prosecution case.

3. For the prosecution to succeed in proving the offence of defilement the following ingredients ought to be proved-

1. Whether the victim is a child.

2. Whether there was penetration of the complainant's genitalia.

3. Whether the penetration was by the appellant.

See Philip Maingi Mueke -vs- Republic (2005) e KLR and Charles Wamukoya - vs- Republic (V. Appeal No. 72 of 2013).

4. **Section 8(1)** of Sexual Offences Act provides that

"8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".

There is no doubt that the victim was a minor aged 12 years nor that there was penetration of the genital organs of the victim.

The question to determine is whether the penetration was by the appellant.

5. I agree with the trial magistrate that from a medical view, it cannot be confirmed whether the victim was penetrated or not. However the trial magistrate went ahead to state that medical evidence is not the only way in which a charge of defilement may be proved citing **Kassim Ali –vs- Republic (2006) e KLR** where the court held that

"the absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence."

6. PW1's (mother to victim) evidence was that when she went to her house at 7.00p.m. the victim was not in the house.

The victim (PW3) testified that around the same time, her mother (PW1) wanted to beat her with a metal bar when she found her fetching water at the landlord's place, that she ran way to Kwamba stage, but came back and stood near their gate when she also met her cousin one Sillas Kanyaka who told her that her mother had gone to report at the police station. It was her evidence that she saw Simon the appellant who grabbed her and took her to his house five minutes walk away.

7. On cross examination the victim testified that she was fetching water with one Augustine her friend when her mother came and wanted to beat her, but did not testify as to why her mother wanted to beat her. At the appellant's house her evidence was that Augustine was also there. The question that lingers in my mind is if there were two men in the appellant's house and one was her friend, then who between the two may have sexually assaulted her?

8. Further if, as she testified, that she could not scream after the sexual intercourse, did she try to scream before the act? Where was Augustine all this time when she was being sexually assaulted?

The victim spoke of her **uncle SK** who told her that her mother had gone to the police station. Why wouldn't this uncle tell the mother that her daughter the victim was waiting at the gate of their house?

The two men, Augustine and SK did not testify.

9. There is too the medical evidence adduced by Dr. Juma Alunda PW2. His conclusion upon examination of the victim was that the victim's hymen was missing and no fresh injuries could be seen hence stated that he could not conclusively state that the minor victim had sexual intercourse on the alleged date, this being informed by his evidence that injuries for a minor lasts for about a week after the act, and further that the minor was sexually active.

10. In the end, what was before the trial court was circumstantial evidence which in my very considered view was riddled with inconsistencies and contradictions in substance.

11. In the case **John Gacoki Nzilu –vs- Republic(2018) e KLR** the court citing the case of **Abanga** *alias* **Onyango –vs- Republic Criminal Appeal No. 32 of 1990 (UR),** the court of Appeal rendered that

> ***"It is settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:***
>
> *(i) The circumstances from which any interference of guilt is to be drawn must be cogently, and firmly established.*
>
> *(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.*
>
> *(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and no one else."*

12. A close re-examination of the evidence before the court cannot be said to be cogent or conclusive that the victim was defiled by the appellant.

The medical evidence which is essential to prove the offence of defilement raises serious doubts as to whether the victim was defiled on the material date. I say so because the inference that can be drawn when the doctor stated that he doubted whether the minor was defiled on the stated date cannot be ignored because if it was so, injuries on the genitalia of the minor could be evident. This was not the case.

13. The complainant could not be taken to have been an innocent young girl. She was sexually active (medical findings) yet she lied to the court that it was her first time to have had sexual intercourse.

She admitted that one Augustine with whom she was fetching water with and that he was in the appellant's house when she was allegedly forced to go to her friend.

It is therefore doubtful as to whom, if at all she had sexual intercourse with on that material date which the doctor discounted. It was not her evidence that the appellant had sexually assaulted her any other day before.

14. I am minded that minor contradictions that are not grave and do not go to the root of the prosecution's case ought not invalidate a valid judgment - **John Mutua Musyoka –vs- Republic (2017) e KLR.**

In my view the contradictions in the prosecution's evidence are substantial and have caused doubts as to the credibility of the minor victim's evidence and that of her mother (PW2). These are critical, taking into account that the prosecution is duty bound to prove its case beyond any reasonable doubt; short of that, the court must give the benefit of doubt to the appellant.

15. For those reasons, I am unable to find without hesitation that the minor was sexually assaulted by the appellant despite there having been penetration to her genitalia, and for which medical evidence doubted was so caused on the material day.

Consequently, I come to the finding that the evidence adduced before the trial court was not sufficient to sustain a conviction.

Accordingly, the appeal succeeds and is allowed.

Both the conviction and sentence are set aside.

The appellant is set at liberty unless otherwise lawfully held.

Dated and Signed at Nakuru this 27th day of March 2019.

……

J.N. MULWA

JUDGE

Dated, Signed and delivered at Kiambu this 10th day of April 2019.

……

C. MEOLI

JUDGE