



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIVASHA
(CORAM: R. MWONGO, J)
CRIMINAL APPEAL NO. 61 OF 2016

NAFTARY NG'ANG'A NDUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 945 of 2014 in the Senior Resident Magistrate's Court,
Engineer, (Hon G. N. Opakasi – RM)

JUDGMENT

Background

1. The appellant was convicted and sentenced to 20 years imprisonment in Naivasha Cr. 945 of 2014 for the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act No. 3 of 2006**.
2. Dissatisfied, he has appealed against the judgment of Hon, G.N. Opakasi (RM) delivered on 28th November 2014, on the following grounds:
 1. That the learned trial magistrate acted on wrong principles to convict on evidence of the age which was not proved.
 2. That the learned trial magistrate erred in law and fact by holding that the complainant was penetrated by the appellant but failed to analyze circumstances and evidence on record to realize that it was a fix.
 3. That the learned trial magistrate erred in law and fact by awarding a conviction based on evidence full of presumption and assumption, unfounded facts not supported by evidence.
 4. That the learned trial magistrate erred in law in the burden of proof by using wrong standard of proof in the criminal case.
 5. That the learned trial magistrate erred in law by failing to analyse critically the defense the appellant offered and failed to give reasons as to its admissibility or why it was not admissible.
3. The issues that arise from the appeal and submissions on appeal are as follows:
 - a. Whether the complainant's age was proved
 - b. Whether penetration was proved
 - c. whether the burden of proof was discharged
 - d. whether the appellant's defence of alibi holds
4. The brief facts are as follows: The prosecution presented six witnesses, and the defendant gave unsworn testimony on his behalf. PW1, the complainant, went home for school fees on 13th October 2014. Her sick grandmother sent her to a neighbour's home. On her way back she

was accosted by the accused who had a panga; he grabbed her and took her to his house and tied her to a window where, according to PW1, the accused had also tied his own daughter, E; Later that evening, the accused's son untied the girls at the instruction of the accused and gave them food. It was about 7.30pm and after eating they went to bed and E was called to accused's bedroom where he slept with her. Accuse thereafter called PW1 to his room and, on her refusal, he forced her to his room. That he was already naked, had a panga, forcefully removed PW1's clothes and raped her by putting his penis into her vagina. The following morning the accused again defiled both his daughter and the complainant.

5. PW2, MM, the complainant's grandmother testified that she had sent the complainant to take a bag of vegetable to Mama Wambui's. The next morning she went to Mama Wambui's where she thought the complainant was, but she had not slept there. PW2 told the police and went back home. At 6.00pm when the complainant didn't return, she called the police again to inform them. Later, the complainant returned and said she had been locked up by the accused and raped. PW2 went with PW1 and reported the incident to the police, who told her to return and check if the accused was at home and to call them. She left PW1 with the police, and the accused was arrested. Later PW2 took PW1 to Kinangop police station and then to Engineer District hospital where she was issued with the PRC form.

6. PW3 was Maureen Mukhono. Her evidence was that on 13th October, she was at her house when PW2 sent PW1 to bring her some clothes to sew. She uprooted some cabbages and gave them to PW1 to take back to her grandmother. PW1 left immediately. The following morning PW2 came to her house looking for PW1, and she explained that PW1 had left immediately after she gave her some cabbages to take home to PW2.

7. PW4, Dr Maingi Muchiri testified that he examined PW1 on 16th October, 2014. He found that she had a broken hymen; her labia minora was torn and she had a whitish smelly discharge from her vagina. This was the result of an infection. He then filled and signed the P3 form. He estimated her age to be 12 years.

8. PW5 APC Denis Ogaro was the arresting officer. He recounted that PW2 had come to the AP post with PW1 and reported the incident. This was at about 9.30 am on 15th October, 2014. PW1 explained that she had been held hostage in the accused's house on 13th and 14th October and had returned on 15th October, 2014. He and PAC Advine Isiakho then went to the accused's home, and arrested him.

9. PW6 Constable Philip Gatheru, was the investigating officer. He testified that on 15th October, at about 7.00pm the accused was brought to the station together with the complainant and her grandmother. The complainant narrated the incident to him. He issued them a P3 form and directed them to take the complainant to Engineer hospital, and on the following day they returned to record their statements.

10. The accused gave unsworn testimony. He stated that he is a casual labourer living in a rented house at Weru; that he had 3 children all in school; he denied that he did or could have committed the alleged offence; that he could not have done such an act in the presence of his children; that his elder child cried when he was arrested.

Proof of Age of the Complainant

11. The trial court recognized that PW1 was a child and took her through a voir dire examination on 12/1/2015. At the time of giving testimony, she said she was 13 years old. The appellant impugns the contradictory evidence availed on the complainant's age in that the charge sheet shows her age to be 12 years; She said she was 13 years old; Dr. Mayende estimated her age at 12 years; Dr. Maingi stated her age to be 12 years and the P3 gave her age as 15 years. The appellant also pointed out that none of the doctors gave an age assessment.

12. I have perused the P3 form. The age of the complainant as indicated in it is 12 years as at the time she was medically examined on 16th October, 2014. It is rational to expect that on giving evidence in 2015 she had turned 13. In the case of in **Musyoki Mwakavi v Republic [2014] eKLR** which was supplied by the state, it was held that:

“...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense...”.

13. Further in the case of **Francis Omuroni v Uganda Court of Appeal Criminal Appeal No. 2 of 2000**, it was held that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”

14. The medical report provided proof of the age of the complainant. I therefore see no reason to interfere with the finding of the trial court on the complainant's age.

Proof of Penetration and issues of Corroboration

15. The appellant argued that there was no corroboration of the vital parts of the complainant's evidence. His view was that only a child of tender years is allowed to give uncorroborated evidence and this was not applicable to the complainant who was in the tender years bracket of 12-15 years.

16. The accused also argued that the evidence given by the complainant was marred by assumptions and that the story itself did not make sense. The complainant's narration was not supported by any other evidence and the same cannot be relied on.

17. This raises the question whether all evidence must be corroborated in defilement cases, or whether the evidence of the victim alone is sufficient. On this, the courts have made pronouncements on corroboration and conviction on the evidence of a single witness. In **Kassim Ali v. Republic [2006] eKLR** it was stated:

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

18. The same was further reaffirmed in *George Kioji vs. R - Nyeri Criminal Appeal No. 270 of 2012* (unreported) that:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

19. In the present case, the minor gave a detailed account of what transpired between her and the accused. Further, the P3 confirmed that the complainant’s hymen was broken, her labia minora was torn and there was a bloody whitish discharge that was smelly. The report clearly stated that the injuries on the complainant were about three days old which meant that the likelihood of their having been due to forceful penetration perpetrated by the accused was high. It cannot therefore be said that there was no evidence connecting the appellant to the offence. The trial court heard all the witnesses and had the opportunity to observe their demeanour. The court found the witnesses to be truthful and, in my view, there is no reason to disturb that finding.

20. This ground of appeal also fails.

Whether the appellant’s defence of alibi holds

21. The appellant argued that the trial magistrate failed to take into account or explain why his defence of alibi was not established. What is alibi? The Cambridge Dictionary defines the term alibi as:

(1) proof that someone who is thought to have committed a crime could not have done it, especially the fact or statement that they were in another place at the time it happened:

an excuse for something bad or for a failure

I have perused all of the accused’s evidence adduced in his defence. He gave unsworn testimony. What is the effect of an unsworn evidence? In the case of **Josephat Muli Musyimi v Republic [2016] eKLR** the court was guided by the principle held in **May v. Republic, C.A. Cr Appeal No. 24 of 1979 (1981) KLR 129**: which stated that:

“An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case.”

22. But more critically, there is nowhere in that evidence where he raises an alibi, and his complaint on alibi therefore fails.

23. Accordingly, the appeal fails and is hereby dismissed.

24. Orders accordingly

Dated and Delivered at Naivasha this 2nd Day of May, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Koima for the State
2. Appellant in person
3. Court Clerk – Quinter Ogutu