



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 227 OF 2017

RASHID NDETE SHIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine S.O. Case no. 3of 2017 delivered on the 30th day of November 2017 by Hon. J. Nthuku, SRM]

JUDGMENT

1. The appellant was on 30/11/2017 convicted and sentence to imprisonment for 20 years for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act. The appellant challenged the decision of the trial Court on the following grounds of appeal.

1. **THAT** the learned trial Magistrate erred in law and in fact by convicting me in the present case yet failed to appreciate that I was not given adequate time and facilities to prepare my defence as provided for by article 50 of the Constitution.
2. **THAT** the learned trial Magistrate erred in law and in fact by failing to appreciate that identification of the accused person was not adequately proved as provided for by law.
3. **THAT** the learned trial Magistrate erred in law and in fact by failing to appreciate that the medical evidence was not sufficient enough to provide corroboration to the charges.
4. **THAT** the learned trial Magistrate erred in law and in fact by failing to appreciate that the complainant's age was not adequately proved as provided for in law.
5. **THAT** the learned trial Magistrate erred in law and in fact by dismissing my defence with no reason yet the same was cogent enough and raised credible doubt against the prosecution's evidence.
6. **THAT** I pray to be supplied with the certified copies of committal bundle and its judgment.
7. **THAT** further grounds shall be adduced during the hearing of this appeal.

The appellant filed written submissions which he relied on during the hearing of the appeal.

2. The DPP made oral submissions in opposition of the appeal as follows:

“Miss Macharia

Appeal is opposed.

Appellant convicted of defilement contrary to section 8 (1) (3) of the Sexual Offences Act and sentenced to serve 20 years. Complainant was 14 years 10 months at the time of the incident as per child's card indicated that she was born 5/5/2002.

PW1 testified that she had seen the appellant on the evening of 15/3/2017 as she was going to her friend's place appellant then followed the complainant as she was going home, and he borrowed water from Charles house and he was given. He further followed the complainant who was with her 2 friends S and W as they sat outside a shop on a bench revising. They now dispersed and went home and the appellant also left.

The following day on 16/3/17 the appellant went to the complainant's house early in the morning at 6:00 a.m. He informed the complainant that he had been sent by her friend W to go with him to Mombasa. The appellant boarded a vehicle with the complainant and with her to a place called Mumberes. He took her to a one-roomed house and informed her that he wanted her to be his wife. He undressed her and defiled her. The complainant's father could accompany the appellant's wife and the appellant and the complainant to be arrested.

Pw3 is the father of the complainant. He testified that on the material day he had left home early at around 9:00 a.m. he was called by his wife and told that the complainant was missing and had left the uniform at the gate of their home.

The wife of Pw3 followed the road to the appellant's house and found the wife of the appellant who testified that the appellant had left early in the morning to Mombasa and that he was to use a lorry which was at Mumberes.

Pw3 then arrived at the house of the appellant and accompany of the appellant's wife to Mumberes on arriving they were locked to a house and when the appellant's wife knocked the door the appellant opened. They found the appellant and the complainant in the house.

Pw3 locked the door from outside and called some youth that helped him arrested the appellant and the complainant.

Pw2 is a Clinical Officer who examined the complainant who testified that on examination, the complainant had a foul smelling discharge of the vagina. There were epithelial cells evidence of recent sexual activity.

We submit that the appellant defiled the complainant. He was found red-handed in the same house as the complainant by the appellant wife and the complainant's father. The house was locked from inside and it was the appellant who opened the house.

The defence that they used to share the house with the complainant's father is an afterthought as it was not raised in cross-examination of Pw3 and does if it was true, he did not state what he was doing with the complainant on that date.

Pw4, the Investigating Officer confirmed that the complainant father and appellant's wife were only the people who took the complainant and the appellant to the police.

Evidence is overwhelming offences sentenced to 20 years imprisonment which is the minimum sentence under section 8 (1) (3) of the Sexual Offences Act.

Appeal should be dismissed.

Appellant in reply

The Doctor's evidence does not disclose the potential number of the Doctor. Pw1 was not sworn to tell the truth.

I have in custody for 6 days before being presented in Court. I was arrested on 16/3/17 and brought to Court on 22/3/17."

3. This first appellate court is under s duty to reevaluate the evidence before the trial court and reach its conclusion before considering whether the conclusion of the trial court is to be upheld see **Okeno v. R** (1972) EA 32. The question before the court is whether the defilement of the complainant by the appellant has been proved to found the conviction and sentence.

4. The complainant (PW1) detailed the circumstances surrounding the defilement as follows:

"PW1

I am EN I am 15 years old. I was born in 2002. I stay in Maji Mazuri with my parents. My mother is called JN and dad J. I have siblings HN aged 13 years and A aged 10 years, JN 7 years, R aged 5 years, J aged 3 years and AW 9 months. My elder brother is called K but he doesn't stay with us. I am in [particulars withheld] Primary School standard 6.

On 16th March, 2017 I was going to S's place. She is my friend so I was going to help her. It was 5:00 p.m. We met at my place and S left as I was changing from my uniform and I told her I will follow shortly. I changed and walked towards S's home. I met Rashid and he told me he was coming from Timina's place as he wanted to marry her but she turned him down. I left him and went to S's place. S and I picked jericans to go to the river but before we could leave, Rashid came in and borrowed water from S's mum which she gave him. We went to fetch water and brought it home then we went to revise on a form/bench outside a shop. Me, S and W. It was now 6:00 p.m. Rashid came and stood nearby. We dispersed and went home. The following morning I and my sister H were lighting fire at 6:00 a.m. at our open kitchen. Rashid came and said W told him to go with me to Mombasa. I declined saying I am going to school. He pulled me by the hand and took me to his house and locked me in. There was nobody else in the house. The house was locked when we got there and Rashid took out a key and opened then locked me in and left. Afterwards he raped me.

He raped me when we came back. It is a one roomed house. It has a sofa set and a mattress on the floor and dishes. He first locked the door from inside and said I will be his wife. He took me to the mattress and made me lie on the mattress. He undressed me. I had a dress and a biker and a panty. He removed the biker and panty then rolled the dress up. He removed his trouser half way and lay on top of me then raped me. He said he wants to move to another house. I dressed and sat on the couch. He took the couch out and locked me inside. My father came and found him outside the house and ordered him to open the door which he did. Dad came with

Rashid's wife and both of us were taken to Mumberes Police Station. I explained to the officers what had happened. I was taken to hospital and treated.

Treatment card – PMFI – 1. P3 Form – PMFI -2. Dad had gone to work and mom was asleep when I sneaked out. I had never seen Rashid before the day before he raped me. That is Rashid (points at accused). He is the one who told me his name is Rashid the evening we met.

Cross-examined by Accused person:

I saw you the first time as I went to S's place. You told me your name is Rashid. You came to Shiko's place and borrowed water from her mother and I saw you it was at 5:00 p.m. You came to house home at 6:00 a.m. and that is when you told me to go with you. H had gone inside to dress for school when you came and held my hand. I went to Mumberes with you. Inside your house you undressed me. You took me to only one house but there is another house nearby. I didn't see anybody else in the other house. You told me that W said I go with you. That is why I didn't resist. You promised to take to Mombasa. You never undressed fully.

Re-examination by Prosecutor:

It is a plot which is fenced where he took me. The other house was locked. He only entered one house.”

5. The examining doctor PW2 testified on his examination of the complainant as follows:

“PW2

I am Dr. Philip Kamau – Medical Superintendent, Eldama Ravine District Hospital. I have a P3 form for a 15 year old child who I examined and filled P3 form. She was defiled by a person known to her on 16th March, 2017. She said she had previously been defiled at the age of 9 years.

She had no injuries on all limbs. The approximate age was 14 years. She had foul smelling discharge and dark blood. No injuries. She had been investigated and treated i.e.HVS. She had no infection, no sperms were seen, Hepatitis B was negative, UDRL and pregnancy were negative.

She was given PEP and antibiotics. The approximate age of injury was 4 days. I have the PRC forms and also the treatment card. Her hymen was broken. She had RBC and many epithelial cells meaning recent friction in vaginal.

I filled the P3 form on 20th March, 2017 and I produce it as an exhibit – Exhibit 1. I produce treatment card for 16th March, 2017 as an exhibit – P. exhibit 2. I also produce PRC forms as an exhibit. They were filled on 16th March, 2017 at our facility – P. exhibit 3. I wish to note that examination was limited due to her menses.

Cross-examination by accused person:

She had no injuries in her vagina. She had sexual intercourse previously. She had blood consistent with menses but the same isn't indicated in the P3 form. It is in the PRC forms stating menses. The epithelial cells and RBC mean she had recent sex.”

The medical evidence confirmed recent sex although the complainant had previously had sex resulting in her hymen being torn.

6. The father of the complainant related the facts surrounding the disappearance, search and rescue of the complainant at the appellant's rented house as follows:

“PW3

I am J. N. W. I stay in Maji Mazuri. I am a watchman at Maji Mazuri. I know E. N. my 2nd born. She is aged 15 years. She was born in May, 2002. This is her Immunization Card – PMFI -3. I produce it as an exhibit – exhibit 3.

On 16th March, 2017 I left home at 5:00 a.m. to go to work. I left E, her siblings and my wife and told that N wasn't home and her uniform was at the gate. I told my wife to go to her school and ask about her. She went and talked to the friends who told her that there was a man in the village previous evening who was looking for girls to take to Mombasa for work. She went asking for the said man and she was directed to his house. They found the man's wife and she told her he left the house at 5:00 a.m. saying he is going to Mombasa but the lorry they are going in is at Mumberes. When my wife told me this, I went to Mumberes with the accused's persons' wife. At Mumberes we went to Mlango Tatu and asked if they knew a man who resides there and has a Coastal accent of Kiswahili. The lady pointed at a house and told us he resides there. We went to the said house (me and accused's wife). The wife knocked and the accused person opened the door. We went in and found Esther and the accused person. It is a single room. They were cooking potatoes. I locked the door from outside and called for help, youths came and helped me to restrain the man. They tied him with ropes and we took him to the Police Station at Gatarakwa.

(COURT: Accused identified by the witness)

I didn't interrogate E. I took her to Eldama Ravine Hospital where she was treated and P3 Form filled. I had seen him long before

the incident at Maji Mazuri.

Cross-examined by Accused person:

On 15th I spent the night at home and so did E. I left at home the following morning when I went to work. I am with your wife and caught you red handed with the child. The villagers know your home so they directed my wife to your home where she met your wife. I don't know you well. I saw you in Maji Mazuri sometime back because of your accent. You and E had locked yourselves from inside but you opened when we knocked. N said that you wanted 2 girls to take to Mombasa. I don't know what your intentions were. I don't know what you do for a living. I saw you once while at work off loading goods at Maji Mazuri in a shop.

7. PW4 confirmed the escort of the appellant upon arrest by members of the public as follows:

“PW4

I am No. 91611 PC. Ebei Patrick from Gaterakwe Police Post, Timboroa Police Station. I am the Investigating Officer in this case. On 16th March, 2017 I was informed by CPWL. Karoi in-charge of crime office that this case had been minuted to me.

A suspect had been brought to the station by members of public on suspicion of defilement. Rose Mtope (the suspect's wife) was among them. He had been flushed from a certain house with the child. I visited the house at Mlango Tatu and saw the one roomed house. The members of public who arrested the suspect are the ones who led me to the house. I issued P3 Form and referred the girl to hospital. PC. Woman Fanice accompanied her to hospital and the doctor confirmed the child had been defiled. I interrogated the child and she said that the accused person took her from her home that morning and led her to Mlango Tatu in Mumberes where he defiled her. That is the man (points at accuse person). I didn't know him before this incident.

Cross-examined by the Accused:

I found you already in cells. Among the people who arrested the accused person was the complainant's father and your wife. The child said you defiled her. You defiled her inside the house she was found in. I don't have the PRC Form.”

8. When put on his defence the appellant in an unsworn statement alleged that the charge was a frame up the result of a disagreement between him and the complainant's father over money as follows:

“DW1

I am Rashid Ndeta Shira. I stay in Maji Mazuri but my home is Mombasa. On 2nd May, 2017 I went to look for work in Maji Mazuri Centre. I joined other workers including complainant's father. He told me to go to Mumberes to get other workers to harvest maize. On that morning I went to the Centre and boarded a vehicle with JN among others. We started harvesting maize in Mumberes and decided to look a house in Mlango Tatu to stay there for the weeks we would be working. J N and I booked one room and continued working together as friends and sharing that room. We finished harvesting and agreed with a certain man to weed his farm on 4th. We asked for deposit of Ksh. 1000/= and worked the whole day and the next 5 days. He said he wants to go to the Centre to pick our pay as I cook. I cooked and N came and said he didn't find our employer at home. We went to Maji Mazuri that evening and agreed we meet early the following morning. That morning I went to collect N but he said he was sick so I decided to go alone and collect our balance to come and share with N. I went to our employer and he said he had already given N our full pay so he didn't know what I was talking of. I told him to help me with money so as to go back to Maji Mazuri. I went to N and asked him why he defrauded me but he said he had used the money. We disagreed and I went to the village elder Maji Mazuri to report but he wasn't there, I went back to Mlango Tatu and got other jobs.

On 16th as I was at home I saw 2 people come and other 10 people. They arrested me and took me to the station. I was locked up and brought to Eldama Ravine hospital. The complainant was availed too. I was framed with defilement. The doctor said there was no evidence of injuries in the girl's genitalia. N framed me because I wanted him to pay me back the money he defrauded me.”

Determination

9. At the outset, the unsworn statement of the appellant which is technically not evidence and of low evidential value as held in **May v. R** (1981) KLR 129 does not afford an answer to the prosecution evidence that the appellant was caught red-handed with the complainant girl locked up inside his room although the alleged that the room had been taken by the complainant's father and himself.

10. The complainant testified that she had been locked up in the room by the appellant and raped, and was rescued by her father and the appellant's wife leading to the arrest of the appellant and escort to the Mumberes police station. PW4 confirmed the appellant had been brought to the police station by members of the public who had arrested the appellant from his one roomed house.

Conclusion

11. In conclusion, the complainant who complained of having been lured by the appellant to a one-roomed house at Mumberes and raped was rescued from the house by her father and members of the public after the appellant was forced to open the door. The appellant's explanation that the one roomed house had been hired by the complainant's father and himself does not answer to the issue of defilement of the complainant, which was confirmed by medical evidence presented by the examining doctor. There was no valid defence to the charge of defilement of the complainant, which I find proved beyond reasonable doubt against the appellant.

12. The complainant's Child Immunization Card P. Ex No. 3 produced by the complainant's father indicated that she was born in 5th May 2002, making her under 15 years at the date of the defilement on 16/3/2017. The appellant was charged with defilement contrary to section 8 (3) of the Sexual Offences Act which applies to defilement cases on victims aged between 12 and 15 years. I, therefore, do not find any prejudice to the erroneous indication in the particulars of the offence that the complainant was aged 15 years.

Order

13. Consequently, for the reasons set out above, the Court finds no merit in the appellant's appeal herein and the same is dismissed.

Order accordingly

DATED AND DELIVERED THIS 22ND DAY OF MAY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent