



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRA NO. 112 OF 2017

(FORMERLY NAKURU HCCRA NO.90 OF 2015)

ALI HASSAN KHAMISI alias ALI KINYOZI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court

at Eldama Ravine Cr. Case no. 218 of 2013 delivered on the 8th day of April, 2014

by Hon. M. Kasera, SRM]

JUDGMENT

1. The central thesis of the defence in this case is that the trial Court adopted a theory not supported by evidence to convict the appellant, and relying on *Okethi Okale & Ors v. R* (1965) EA 555, the appellant urged the appellate Court to consider the evidence of key prosecution witnesses Pw1 and Pw2, both minors and find fatal contradictions as to how the offence is alleged to have occurred.

2. The appellant was convicted and sentenced to imprisonment for life on 8/4/2014 for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act, the particulars of which were that the appellant had “on the 13th day of March 2013 at [particulars withheld] village in Koibatek District within Baringo County committed an act which caused the penetration of his penis into the vagina of E.K. a child aged about 5 years.”

The first name of the complainant is variously spelt with I or E as the first letter.

3. The appellant on 17/4/15 filed grounds of appeal as follows:

1. **THAT** the subordinate Court erred in law and fact by convicting and upholding conviction on the basis of flimsy evidence.
2. **THAT** the subordinate Court erred in law and fact by failing to consider that I was not taken for medical examination.
3. **THAT** the subordinate Court erred in law and fact by upholding conviction without considering the evidence adduced before Court as a whole.
4. **THAT** the subordinate Court erred in law and fact by upholding conviction on the basis of single evidence.
5. **THAT** the subordinate Court erred in law and fact by upholding conviction without considering the irregularities in the doctor's report.
6. **THAT** for the genuine reasons that I cannot remember all that traversed during my trial, I pray to be supplied with a certified copy of the Court proceeding to enable me supplement my grounds of appeal.

4. At the hearing of the appeal the Counsel for the appellant then on record urged the said grounds of appeal and the DPP responded in their submission as follows:

“Mr. Maina Kamau

Petition of appeal dated 17/4/15 by the appellant in person for the conviction and sentence by Kasera, PM of 8/4/15.

We have raised 6 grounds which I argue together.

Contradiction

p. 8 of the Record evidence of Pw1 testify that she was defiled by the appellant when Pw2 brother left her. A lady came to the scene and the brother later and other people.

The sequence of events in her evidence of Pw1 that she was defiled when the brother left and that the 1st person to come to the scene was a lady whose name was not disclosed, and who never testified. According to the Pw1 evidence B. Pw2 came later.

p. 8 Pw1 on cross-examination by appellant told the Court that the brother came after the alleged defilement when she raised alarm.

Pw2 B. the brother at P. 10 that he came back and found the victim's inner wear stained in blood. He then said that it was at the room and they were lying down. The witness said that Ali laid down and in the same breath and the complainant came to lie on the appellant.

There is contradiction on the evidence of Pw1 as against the evidence of Pw1.

Pw2 once again contradicts and said that he found the appellant removing his pants. The evidence of the witness Pw2 lacked consistency and credibility. The Court erred in considering the evidence of Pw2.

On cross-examination Pw2 at p. 11 said that it is people who told the mother that the appellant defiled the complainant. During the entire time there were only 2 witnesses alleged at the scene were not called and one reason was given for the failure.

Pw3, the mother at p. 11/2 said that when she came from work at 5 pm she found the child had been defiled and that it was Pw2 who told her about the defilement. Pw3 has never at the scene, and in her evidence at p. 12 she confirmed Pw2 told her that when the Pw2 came back from the shop he found the appellant defiling the complainant. Pw3 said that she found bruises on private parts of the complainant and the minor was taken to hospital on 14/3/13. No reason is given at trial why the appellant was never taken for any medical examination. No samples were taken from the appellant, and there was no allegation that the appellant had taken off from jurisdiction evidence of Pw3 no contradictory on how she got the information on the alleged defilement.

Ground 4 of the Petition

The witnesses named by Pw1 and Pw2 were never called to testify. I subject to the Judgment at p. 2 paragraph 2 Pw3 came back and was by Pw1. The evidence of Pw3 was that she informed by Pw2 and not Pw1 as stated in the Judgment. The trial Court erred on the effect as to how the information was relayed.

At p. 4 of the Judgment finding the accused does not categorically deny defiling.

The finding was made in error. Evidence of the appellant does not indicate that the actual time admitted the charge on in any other manner defiled the complainant. I refer to p. 25 of the Record. He stated that he was on duty when the alleged defilement happened.

The trial Court instructed itself on the evidence of the appellant. I refer to **Okethi Olale v. R** (1964) EA. 555.

The trial Court made its own hearing and proceeded to convict the appellant. We pray that the appeal be allowed.

DPP

Appeal is opposed.

Appellant convicted of defilement of 8 (1) and 8 (2) and sentenced to life imprisonment.

Pw1 is a minor aged 5 years.

On material day Pw3 left her children Pw1 and Pw2. Pw2 aged 6 years.

Appellant was their neighbor and he came to their home sent Pw2 to go and buy doughnuts and sweets and that is when he defiled Pw1.

Pw1 testified that when Pw2 was sent to the shop she was left with the appellant who did Tabia Mbaya to her on the gate. She bled from the private parts. She testified that she raised alarm and Ali ran away to the cemetery.

Evidence was corroborated by Pw2 who testified that when he came from the shop, he found the appellant lying down and his sister Pw1 on top.

p. 10 line he states that they were lying down and Pw1 came and on him. Pw2 is an eye witness who found the appellant on the act. The evidence was corroborated by the Pw3 and Pw5.

Pw3 testified that she was informed by both Pw1 and Pw2 that the appellant had defiled Pw1. It is not true that there is contradiction as to who told Pw3. I refer to paragraph 12 line 3 and 4. Pw3 said that Pw1 told that her private parts had been injured and that – Ali had done Tabia mbaya and that Pw2 told her. There is no contradiction. It is clear that Pw3 was told by both Pw1 and Pw2.

Pw3 on checking Pw1 saw bruises. Pw1 was feeling pain when urinating and was walking with stick. Pw3 took Pw1 to hospital.

Pw5 the doctor stated that on examination the complainant was checked on her private area she was bruised on labia minora and majora and there was partial hymenal tear. Urine analysis showed spermatozoa but there were no pus cells. He concluded there was defilement.

Pw1 and Pw2 testified that they knew the appellant as their neighbor. Pw2 said appellant is Kinyozi.

Appellant was positively identified by Pw2 and Pw1.

I refer to the Judgment that appellant does in having committed the offence.

Appellant did in day the offence. The case was proved by the evidence of Pw1 and Pw2. The learned trial Magistrate was analysis the evidence. The appellant did in day the offence.

Mr. Kamau in reply

We submit that in talking the accused does not deny the offence, the Magistrate made a theory of conclusion does to be an equivocal. The trial Magistrate then set mind that the accused was guilty. The trial Court erred in making a theory. I refer to Okethi Olale case.

Pw5 did not give any reason as to why the appellant was not examined and no witness gave any reason.

I urge the Court to consider the evidence of Pw1 and Pw2 who are both minors and find what contradictions as to how the offence occurred.”

5. The question for determination is, therefore, whether the evidence presented by the Prosecution proves the alleged offence of defilement and the involvement of the appellant as the perpetrator. The Court shall therefore record evidence (**Okeno v. R**), (1972) EA 32.

Analysis of Evidence

6. Pw1, the complainant herein whom the trial Court on *voire dire* found “will give unsworn evidence due to her tender age [and] she is not able to understand the meaning of Oath” said as follows:

“**PW1**

I am I. K. I live with mama and Baba. I go school. I go to school with B. He is my brother. B is older than me. I am in class Top. Mum did not tell me my age. My mother went on duty my aunt also went on duty. I was left at home with B. Ali came home as we were playing with B. Ali told B to buy “Kangumu” doughnut and sweet. Ali gave money to B. It is bought down there. I was left at home with Ali. Ali did “Tabia mbaya” to me when I was left with him. He did that when B left me. I screamed when he did Tabia mbaya. A lady came. B also came. Other people also came. I bled from my private parts (touches her pubic area). Ali ran to the cemetery. He did tabia mbaya to me at the gate. The lady told me to stay inside the gate. Ali did not come back. I stayed there till it became cold. I told my mum and another person. Mum took me to the hospital. The doctor wrote something. I was given medicine. I was injected. I slept in the hospital. I went to the police when mama B and Baba Ega was sleeping. My inner wear was stained with blood. I know Ali’s place. It was the first time he did tabia mbaya. She points at accused he is Ali.

Cross-examination by Accused: I know you. You are Ali. I was playing with B. It is only you came. B came when I raised alarm. I ate the sweet which B gave me. You ran towards the cemetery. We were told to stay inside the gate.

Re-examination: Nil:

7. The complainant’s elder brother aged 6 years gave evidence as Pw2 after the trial Court on *voire dire* found that “witness who is 6 years does not known the meaning for Oath because of his tender years.”

“**PW2**

. I am B. C. We live at [particulars withheld] denning. I go to school at [particulars withheld]. I am in class 1. That day my mother

was not at home I was with I. R. is the eldest then mama. I am older than I. Mum had gone on duty. We were playing at the gate. We were playing "chamba" Ali came he sent me for sweet. Ali sent me for "Kangumu", I came back found I inner wear was stained with blood. I found him doing "Tabia Mbaya" It was on the road near the gate. They were lying down. Ali laid down. I. came to lie on Ali. I saw it at "Wadunyochi which is poisonous. It is round like an egg. People saw accused he ran to the cemetery. I. raised alarm. Ali pulled his trouser down. I's inner wear was light blue. Points at one of the files on the table. Ali laid on his trouser. I. raised alarm. People came to check I. if she was spoilt by the accused. I. had blood on her inner wear. It is mama W who checked I. We were left at the gate but we were told to play behind the house. People told my mother that someone did Tabia mbaya to I. I. was taken to the hospital. Ali lives at the Kinyozi. Ali had shaved us another time. Ali gave me Ksh.30/=. He sent me for sweat. Later he sent me for Kangumu that was the first time he did Tabia Mbaya to I.

Cross examination by Accused: You gave me Ksh.30/=. I came back found you do Tabia Mbaya with I. I. was crying loud. Other ladies came. She touches his pubic area. You did it her points at his pubic area. It was Kwa Wanubi. It is Munubi who sells at the shop where you sent me. Our home is near the shop. You removed I's inner wear. It is people who told my mother that you defiled my sister so my mother took I. to the hospital.

Re-examination: Nil"

8. Pw3 was the children's mother PVM who testified as follows:

"PW3

I am P V M. I live at [particulars withheld]. In March I used to live in Nubian village. I moved out in April. I work at [particulars withheld]. I know complainant I.K. She is my daughter. She is 5 years old. Born on 13/4/2008. She is in Baby class in a school near our house. She used to be at [particulars withheld] Primary School. I went on duty that day I left my husband at home he is J.P. I. I left the children playing. B. C. 6 years and I. K. I came at 5:00 pm. I saw a blood spot on I inner wear. I washed it. I thought something might have scratched her. She told me her private part was injured. She told me Ali did tabia mbaya. C. came told me Ali sent him Kangumu he came found accused defiling complainant. I checked her private part and I saw bruises. She said she was feeling pain when urinating. She was shivering and walked astride. I went with the children to the barber shop. Ali came he was asked what he did. He said he did defile the children but he was ready to pay for her medication. On the way he went back. We went to police station. We then went to the hospital. I went back on 14/3/2013 to take medicine. Medical chit 13/3/2013 MFI 1. We were given P3 form which was duly completed.

P3 form MFI – 2. Ali's house form where we lived was 400 meters away. His school is a neighbor to where Ali had a barber shop.

Immaculate was born on birth notification 23.4.2008. Mungore Sub-location Bungoma. Notification MFI – 3. I was not present when he was arrested. The child is healed.

Cross examination by Accused: I lived in Nubian for two months. I had live in Nubian village and moved out. I moved to [particulars withheld] because you wronged my child. You are Ali Hassan Hassin. I sent my children to the shop. There were neighbours where I lived. It is the child who told me that you defiled her. Her brother only confirmed the same. I made a report to the police. You wanted to take us to the hospital but you changed your mind.

Re-examination: Nil"

9. Pw4 was the Investigating Officer who testified and produced the complainant's birth notification as exhibit no. 3 which indicated the child was born on 13/4/2008, as follows:

"PW4

I am 60131 Corporal Sarah Situma stationed at Eldama Ravine police station. I am the Investigating Officer. On 13/3/2013 at 8:00pm. I was on duty at the station. I received a report of defilement of a child. 4 years 11 months. She was with her parents. I took the child interrogated her. She said her parents were at [particulars withheld]. She said accused Ali Kinyozi found them playing and called her brother B.C. 6 years. Sent him to the shop to buy 2 doughnuts "Kangumu." Accused carried complainant on his lap. C. came. Accused took the "Kangumu" gave complainant one and B. was also given one. He sent B. to buy a sweet. He came back found his sister raising alarm. He found accused laying on complainant and defiling her. He left her as he saw B. He walked towards the graveyard. I went there day time the following day. Many of those are employed at [particulars withheld] I advised that she be taken to the hospital. They brought treatment note. MFI – 1 medical chit from Eldama Ravine District Hospital 13/3/2013. The card revealed that complainant was injured on her private part and there were spermatozoa. She told me Ali Kinyozi defiled her. I gave them P3 form which was duly filled. MFI – 2 identified. I sent for birth notification. Birth notification MFI – 3. Born 13.4.2008 now exhibit 3. I saw alteration. I called for clinic card. Mother and child health care booklet MFI – 4. Date of birth as 13.4.2008 at Khasoko Western Province page MFI – 4 (a). I wish to produce MFI – 4 and MFI – 4 (a) as exhibit. I wrote statement for complainant and her brother and mother. I looked for accused. On 16.3.2013 in company of P.C. Muraka. We went to where accused worked. Accused saw and he ran away. Members of the public helped us and we arrested him near AP Camp Kamelilo. I charged him of this offence. I had not known accused or complainant.

Cross-examination by accused: The child was defiled according to P3 and treatment sheet. I told them to go to the hospital. It was on 13/3/2013 when you defiled the child. I checked the child and her private part was injured and she was also walking with a lot of pain with her legs astride. I have said the truth. I went to scene of crime. I came to you place and you ran to saw mill. Muruka took a motor bike and he arrested you as you were running.

Re-examination: None.”

10. Pw5, is the Clinical Officer who examined the complainant and filled the medical examination form P3, and he testified as follows:

“PW5

I am Philip Kipkorir Yator. I am a Clinical Officer Eldama Ravine District Hospital P3 form MFI – 2 referred. I filled the P3 form of a 41/2 year old child. I filled it on 14.3.2013. The child was brought to hospital with history of defilement.

Child was tense.

H/A NAD

T/A supra pubic tenderness.

Upper/lower limb NAD.

Age of injury one day.

Fintury bruises and labia and partial hymenal.

Tear no discharge.

Urine analysis spermatozoa seen no pus cells.

Impression defilement.

Filled on 14/3/2013.

MFI – 2 now exhibit 2.

Exhibit 1 I relied on. It is ...I filled P3 form. MFI – 1 now exhibit 1.

Cross-examination by accused

I examined the child she was in pain. Her private part was injured. (It was bruised). Evidence is on the P3 form. Sperms were on her urine. My duty was not to look for you. It is the duty of the Police Officer to look for you.”

11. The appellatant gave an unsworn statement as follows:

“I am Ali Hassan Khamisi. I live in Nubian village near mosque. I operate a barber shop. I was on duty on 13.3.2013. I was operating a hotel. Health people told me to close. After 3 days boys from Kamelilo told me I defiled a child. The following day Juma Omar called me at 6:00 pm. The girl and her parents and brother came there. We did the case in Nubian village. Ali Musa was also there. We were to see the doctor. We came to this place near DCO. I told them to go but up date me on the outcome. They did not come back. After 3 days they came. Found me repairing the sheep pen. I was arrested taken to police station. My mother asked police where they were taking me. She was told to come to police station. I was put to Court then to prison. They moved out of Nubian village. I have always attended Court.”

Determination

12. The findings of the medical examination by Pw5 as recorded in P3 form Exh. 2 that “bruises/lacerations on both labia majora, partial hymeneal tear” and presence of spermatozoa supports the impression formed by the witness of defilement. The evidence of Pw1 and Pw2 that the appellatant defiled the minor Pw1 and the testimony of Pw3, the mother of the child’s report after she discovered a blood spot on the child’s inner wear, and her observation of bruises on the child’s private parts support the charge of defilement.

13. The appellatant’s unsworn statement while accepting events after the complainant, the brother and mother went to seek him out as related by the mother Pw3, does not answer the charge of defilement on the material date the 13/3/2013 when he says he was on duty operating a hotel and health officials told him to close and “after 3 days boys from Kamelilo told me I defiled a child.”

14. No suggestion, reason or excuse is given for the two children’s evidence that the appellatant did “tabia mbaya” or defiled the minor (Pw1). There was no allegation of any grudge with the parents of the complainant or other relatives offered as an explanation for the trumped charge. Why would the two minors and their parents “bear false witness” on the appellatant?

15. With respect, contrary to the submissions by the Counsel for the appellatant, I find the testimony of the two minors consistent in material particulars that according to Pw1 “Ali did “Tabia mbaya” to me when I was left with him” and according to Pw2 “Ali sent me for “Kangumu”, I came back found her inner wear was stained with blood. I found him doing “Tabia mbaya.” It was on the road...”

16. There was no question of identification as the appellant was known to both Pw1 and Pw2, and according to Pw2 *“Ali lives at the Kinyozi. Ali had shaved us another time,”* and the incident happened during the day when the children were left home *“my mother went on duty. Ali also went on duty. I was left home with B. Ali came home as we were playing with B.”*

17. I find that the Prosecution proved the charge of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act against the appellant.

18. The sentence of life imprisonment is the sentence prescribed under section 8 (2) of the Sexual Offences Act. In mitigation, the appellant said only that *“I pray for non-custodial sentence.”* I do not find anything in the mitigation as would inform the Court’s exercise of any discretion as to sentence.

Orders

19. Accordingly, for the reasons set out above, I find no merit in the appellant’s appeal herein and the same is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 12TH DAY OF JUNE 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Maina Kamau for the Appellant.

Ms. Macharia, Ass. DPP for the Respondent.