



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 89 OF 2018

JOM..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

[Being an appeal against the conviction and sentence of the Senior Resident Magistrate's Court at Tamu

(Hon. P.K. Rugut SRM) dated the 13th September 2018 in

Tamu SRMCCRC No. 19 of 2018]

JUDGMENT

Following his conviction for the offence of **Defilement**, the Appellant was sentenced to Life Imprisonment.

1. In his appeal, the Appellant submitted that the evidence about the date when the offence was committed, was full of inconsistencies.
2. However, the Appellant did not elaborate on the alleged inconsistencies.
3. I have noted that in the Charge Sheet, it is indicated that the offence was committed on 9th June 2018.
4. When the Complainant testified, she said that she was unable to recall the date.
5. **PW2**, R, is an aunt of the Complainant. R lived with the Complainant at [particulars withheld] .
6. On 9th June 2018 R was not at home. She had gone to Mnara.
7. Upon her return home, R did not detect anything unusual about the Complainant. It was not until 21st June 2018 when R noticed that the Complainant was unwell. She was walking, with her legs apart.
8. When R checked the Complainant's private parts, she saw lacerations on her vagina.
9. The Complainant told R that it was the Appellant who had inserted the thing which he uses to urinate, into the Complainant's vagina.
10. The Complainant explained to R that the Appellant had threatened to slaughter her if she told her aunt (R) about what the Appellant had done to her.
11. Evidence corroborated the testimony of the Complainant, who had told the court that it is the Appellant who had caused her a lot of pain by inserting his "thing" into her private parts.
12. The Complainant bled, as a result of the Appellant's actions.
13. However, as the Appellant had threatened to kill her if she disclosed what had happened, the Complainant did not report the incident to her aunt, who she was living with.
14. When the aunt took the Complainant to the hospital, the personnel at the hospital criticized her for failing to take the Complainant to

hospital earlier.

15. I hold the considered view that the criticism of the Complainant's aunt was justifiable.

16. But the Appellate says that the impact on the Complainant ought to have been detected earlier, as;

“..... the victim was a minor who could not have withstood the pains of the aftermath of the alleged offence.”

17. He therefore attributed the evidence given by R, to a grudge which arose after he had demanded from her, payment of Kshs 50/=-, which was the balance of payment in respect of work which he had done for the said R.

18. During the cross-examination of R, the issue concerning an alleged quarrel over money was raised by the Appellant.

19. Later, in his Defence, the Appellant testified that the Complainant's aunt was supposed to have paid him kshs 270/=-, for the work he had done.

20. However, he was only paid Kshs 220/=-, leaving a balance of Kshs 50/=-.

21. According to the Appellant, R had withheld that balance because he was required to slash the compound again, since he had not done so well.

22. He also said that R had quarreled with him, after the cows which the Appellant used to graze within the compound where R lived, had eaten her crops.

23. Thirdly, the Appellant said that R was angry with him because he used to send the children to her, to remind her about the outstanding balance.

24. Following the said quarrels, the Appellant says that he stayed away from R compound where he used to graze his employer's cows.

25. It is clear that the Appellant was not a stranger to either the Complainant or to R.

26. Indeed, the Appellant confirmed that he had complimented the Complainant for her beauty.

27. The Appellant also confirmed having told the Complainant that he would marry her, when she had grown up.

28. However, the Appellant categorically denied having defiled the Complainant.

29. In my considered opinion, the law does not require the prosecution to prove that the Appellant had a motive for committing the offence of defilement.

30. The prosecution needed to prove the age of the Complainant; the act of penetration; and the identity of the person who had committed the said act.

31. The age of the Complainant herein was proved to be six (6) years. Proof was provided through the Complainant's Travel Document issued on 2nd May 2018, as well as through the medical assessment of age, which was conducted by **PW3**.

32. The act of penetration was proved through the results of the medical examination, which showed that the Complainant's vagina had inflammation and was reddened.

33. Her hymen was not intact, and her urine had blood cells and pus.

34. The Complainant also had a sexually transmitted disease.

35. The Appellant pointed out that he was also examined medically. He had no sexually transmitted disease.

36. Secondly, whilst he was HIV Positive, the Complainant was found to have been HIV Negative.

37. Ordinarily, when a person has engaged in sexual activity with another person, the results of medical tests would show that the two persons had similar sexually transmitted diseases, if one of them had had such disease prior to the sexual activity.

38. However, that is a generalized statement, which has not been shown to be applicable in most cases.

39. There is no evidence before the court to demonstrate that if the Appellant was HIV Positive, the Complainant would definitely be HIV Positive after engaging in sexual activity with the Appellant.

40. Therefore, whilst the medical reports may not have linked the Appellant to the defilement of the Complainant, I find that the Complainant had positively recognized the Appellant.

41. In conclusion, following my re-evaluation of all the evidence on record, I find that the Appellant was convicted on the basis of cogent evidence, which had been corroborated, and which proved beyond any reasonable doubt that it is the Appellant who defiled the Complainant.

42. In the event, the appeal lacks merit, and it is therefore dismissed.

43. I uphold both the conviction and the sentence against the Appellant.

DATED, SIGNED and DELIVERED at KISUMU

This 12th day of June 2019

FRED A. OCHIENG

JUDGE