



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 55 OF 2018

NELSON OMULOMBIAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court at Maseno (Hon. C. Oruo RM) dated the 16th May 2018 in Maseno PMCCRC No. 929 of 2016]

JUDGMENT

The Appellant, **NELSON OMULOMBI**, was convicted for the offence of **Defilement** and he was then sentenced to Life Imprisonment.

1. In his appeal, he has submitted that he ought not to have been convicted as the prosecution failed to call Essential Witnesses.
2. The Appellant pointed out that the neighbours who had allegedly heard the Complainant telling **PW2** about what the Appellant had done to her, were not called as witnesses during the trial.
3. In view of the failure to call the said neighbours, the Appellant submitted that the prosecution had failed to discharge its burden of proof.
4. As the Appellant submitted, correctly in my considered view, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. That is what **Section 107 (1)** of the **Evidence Act** stipulates.
5. It therefore follows that the prosecution had the burden of proof in establishing the existence of all the ingredients of the offence of Defilement, and also in proving that it was the Appellant who committed the offence.
6. If the prosecution failed to call any witness whose evidence was necessary to prove any of the ingredients of the offence, the court ought not to convict the accused person.
7. A person whose evidence was necessary for the discharge of the burden of proof is deemed an essential witness.
8. However, if the burden of proof can be discharged in the absence of any potential witness, then such a person would not be deemed an essential witness.
9. In this case, the Appellant pointed out that the Complainant had expressly told the court that it was her mother who had told her what to say.
10. Therefore, the Appellant submitted that the testimony of the Complainant was simply a restatement of what her mother had told her to say.
11. I understand the Appellant to be saying that the evidence of the Complainant was a complete fabrication.
12. Indeed, the Appellant emphasized that the said testimony was not supported by any relevant evidence.
13. The Appellant complained that he was denied an opportunity to cross-examine the Complainant. He submitted that if he had cross-examined the Complainant, that process would have shed light on the whole issue, thus enabling the truth to come out.
14. In conclusion, the Appellant urged the court to hold that the conviction cannot stand because it was anchored on fanciful theories and

speculations.

15. In answer to the appeal, the Respondent said that all the ingredients of the offence were proved beyond any reasonable doubt. The said ingredients include the age of the Complainant, penetration and the recognition of the Appellant.

16. Being the first appellate court, I am obliged to re-evaluate all the evidence on record when determining the issues before me.

17. In the process of the said re-evaluation, the court will bear in mind the fact that, unlike the trial court, it did not have the benefit of observing the witnesses when they were giving evidence.

18. The Charge Sheet indicated that the Complainant was six (6) years old.

19. When the learned trial magistrate conducted a *voire dire* examination, to ascertain whether or not the Complainant had the capacity to understand the meaning of an Oath and the importance of speaking the truth, she said;

“Am in middle class. I have come with my mother. She has told me what to say. I know the difference between lying and saying the truth. I will state the truth.”

20. In my considered view, that part of the record must be looked at in a wholesome manner. We should not pick out one sentence and then draw a conclusion from it.

21. If a person focused only on the statement about the mother of the Complainant having told her what to say, it would imply that the Complainant's testimony was a reproduction of what her mother had instructed her to say.

22. However, it must be appreciated that the Complainant also made it clear that she had made a decision to state the truth.

23. She then proceeded to testify about the events of the material day.

24. The Complainant pointed at the Appellant, saying that he not only inserted his “*dudu*” in her private parts, but he also put it on her anus and in her mouth.

25. It was the Complainant's evidence that whilst the Appellant was molesting her sexually, L came in.

26. **PW2** testified that on the material day she was at her farm when she heard L calling out to her.

27. When **PW2** went to the house where L was, the said L informed her that she had seen the Appellant put his penis on the Complainant's mouth.

28. **PW2** asked the Complainant about what had happened, and the Complainant said that the Appellant had put his penis on her vagina and also on her anus and mouth.

29. The Appellant was taken to the police station, by the Village Elder, whilst the Complainant was taken to hospital.

30. When the Complainant was informing **PW2** about the things which the Appellant had done to her, **PW2** was in the company of N, D and E.

31. Therefore, the Appellant submitted the persons who were together with **PW2**, were essential witnesses.

32. First, neither **PW2** nor any of the people who were with her, had witnessed the alleged defilement. They were only informed by L and the Complainant, about what had transpired.

33. In my considered view, it was not necessary for the other persons who were present when L was informing **PW2** about what had happened, to also testify.

34. Provided one of the said people testified, the court would have been given evidence which connected the happenings to the arrest of the offender and also to the steps taken in having the Complainant taken to hospital.

35. Proof is not enhanced by a duplication of either witnesses or of evidence, as it is not the number of witnesses or the number of times that evidence is repeated, that leads to the discharge of the burden of proof.

36. A single witness, who was reliable and credible can give evidence which is sufficient to convict an accused person.

37. **PW3, JOHN SHIGALI**, was a Senior Clinical Officer based at the Emuhaya Sub-County Hospital.

38. He examined the Complainant and found lacerations on her vagina. He also found blood stains on her vagina.

39. The Complainant's hymen was also broken.

40. The vaginal orifice lining was tender.

41. From the results of the examination, **PW3** testified that the Complainant had been defiled repeatedly.

42. **PW4, PC PHOEBE OWANG**, was the Investigating Officer. Her investigations revealed that it was the Appellant who had defiled the Complainant.

43. **PW4** testified that L refused to testify.

44. L A is a sister of the Appellant.

45. She is the person who found her brother committing the offence, and she then called **PW2**.

46. In view of the fact that she had allegedly witnessed the actual actions of the Appellant, when the Appellant had given his penis to the Complainant to suck, I find that L was an essential witness.

47. However, I also appreciate the fact that she refused to give evidence against her brother.

48. In effect, the prosecution did not choose to keep away that essential witness. It is the witness who refused to testify against her brother.

49. Nonetheless, I find that the evidence of the Complainant was corroborated by the medical evidence.

50. The Complainant was most definitely defiled, as was ascertained through the medical examination conducted by the Senior Clinical Officer.

51. The evidence tendered to prove that there was penetration was real. It was not fanciful theories or speculations, as suggested by the Appellant.

52. The evidence of penetration cannot and was not a creation of the Complainant's mother.

53. As the said evidence was real, I find that when the Complainant had promised to tell the truth, she did not intend to recite what her mother had told her; her intention was to tell the court exactly what happened to her.

54. This is a case of recognition, as the Complainant knew the Appellant even before the material day.

55. Accordingly, I find that the conviction was properly founded upon solid evidence.

56. The appeal has no merit and it is therefore dismissed.

DATED, SIGNED and DELIVERED at KISUMU this 12th day of June 2019

FRED A. OCHIENG

JUDGE