



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 14 OF 2018

**ROBERT RANDU KATANA.....APPELLANT**

**VERSUS**

**REPUBLIC.....DPP**

*(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Lamu Criminal Case No. 228 of 2017 by Hon. Njeri Thuku (PM) dated 5<sup>th</sup> March 2018)*

**JUDGMENT**

1. The Appellant was charged and convicted of the offence of defilement before the principal Magistrate's court Lamu. The particulars of the offence were that on 4<sup>th</sup> September 2017 in Lamu West sub-County within Lamu County intentionally caused his penis to penetrate the vagina of MKD a child aged 16 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(i) of the Sexual Offences Act.
2. The Appellant was convicted on the main charge and sentenced on 5<sup>th</sup> March, 2018 to serve 20 years imprisonment.
3. The conviction and sentence triggered the present appeal in which the Appellant has raised seven grounds. Grounds 1,2, 3 and 7 do not qualify as grounds of appeal. Ground 1 and 2 are factual statements descriptive of the case while grounds 3 and 4 amount to mitigation. In ground 4, the Appellant states that the trial court ignored his defence and believed the prosecution witness who lied to the court. Ground 5, is a complaint that the trial court did not give the Appellant time to cross-examine witnesses while ground 6 states that there was no medical evidence linking the Appellant to the offence as the Appellant was not examined.
4. At the hearing of the appeal on 6<sup>th</sup> March, 2019 the Appellant filed additional grounds of appeal. In the document titled "Amended grounds of Appeal" he stated that the charge drafted was null and void; that the medical evidence was unreliable; that the victim's age was not proved beyond reasonable doubt; that the case was made up; and; that the Appellant's defence was reliable.
5. The Appellant also filed written submissions to argue the grounds of appeal. Firstly, he submitted that the charge sheet was defective as it did not contain the word "unlawful". He argued that this was fatal to the prosecution case. Secondly, the Appellant submitted that the age of the victim was not proved and finally that the case was not proved beyond reasonable doubt.
6. Mr. Kasyoka learned counsel for the Respondents argued that the charge sheet was not defective and that any defect was curable under Section 382 of the Criminal Procedure Code. On the issue of age, counsel submitted that the age of the victim as well as the act of penetration was proved. He submitted that medical evidence was sufficient to prove penetration and that the demand by the Appellant for further medical tests was not necessary. Counsel contended that the case was proved and the evidence was proper and the conviction safe.
7. This is a first appeal. As such this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusions. This principle was clearly laid by the Court of Appeal in **Okeno v R (1972) EA 32**. See also **Eric Onyango Odeng' v R [2014] eKLR**. Further, I have to caution myself that unlike the trial court, I did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and I can only rely on the evidence that is on record.
8. I have considered the grounds of appeal, the record and the submission of the parties. The key issue in this appeal is whether the charge against the Appellant was proved beyond reasonable doubt. Other issues are whether the charge sheet was defective; and whether the medical evidence was sufficient.
9. The three elements to be proved in a defilement case are penetration, the age of the victim and the positive identification of the Accused. In **Charles Wamukoya Karani Criminal Case no 72 of 2013 2014 eKLR** the court held that:-

**“the critical ingredients forming the offence of defilement are: age of the complainant, proof of penetration and positive identification of the assailant.”**

10. The evidence presented before the trial court was that the Appellant dragged the complainant into the bush and defiled her. The complainant MKD testified that on the material day at around 3pm she had been sent by her grandmother to the shop. She was in the company of her cousin Hellen. On the way back they met the Accused on a lonely stretch of the road. The accused grabbed her by the hand and told Hellen to go away.

11. H (PW2) a child of 10 years testified that she was with the victim (PW1) when they met the Accused on the road and he talked to the victim (PW1). According to H's evidence the Accused led K to the bush and that K did not look like she wanted to go with him to the bush. H said that she thought the accused was going to kill K and she ran to tell their grandmother. She said that she met their grandmother on the way.

12. MN (PW3) testified that she was the victim's grandmother and that she was alerted by H (PW 2) that the accused had grabbed the victim and led her into the bush. She said that she went and hid in a bush nearby and when they emerged she (PW3) disciplined the victim by beating her while she interrogated her. PW3 further stated that the Accused looked like he wanted to hit her but did not. She said that the victim told her that the accused had removed her panty, made her lie on the ground by force and entered her twice. She reported the matter to the village elder who referred them to the police.

13. The complainant was treated at Hindi Dispensary from where she was referred to Mokowe health centre where she was examined by clinical officer Njeru Joseph. His findings were that the complainant's hymen was not intact, the vagina was bruised and had a whitish discharge. In his testimony PW6, said that she examined her on 5<sup>th</sup> September 2017 at about 1pm and she had no hymen she had bruises on the vaginal wall and had a bacterial infection. PW6 produced the P3 form (Exhibit 4) and treatment notes (exhibit 1).

14. There is no doubt from the testimony of PW6 that at the time of examination the victim had recently had sexual intercourse.

15. The Accused denied that he was at the scene of crime. He stated that he was 26 years old and was married with one child. He was a boda boda rider. He said that he was at his home in Hindi on 4<sup>th</sup> September, 2017 when he received a call from a male customer to go and pick two people who wanted to go to Hindi town. That he went to Shemgambo and found two ladies and one man. He said he dropped them at Hindi town and after two hours the man called back him and asked him to drop the two ladies back at their home. That they asked him to drop them off a short distance before their home.

16. The Appellant said that he met a woman carrying firewood who questioned him. She wanted to know where he was coming from with the two ladies and he told him that they were from Hindi town. The Appellant said that the woman started beating the ladies and he left them and went home. He added that he was arrested the following day and taken to the Mokowe police station. He said that he was charged and that he knew nothing about the case.

17. From the evidence above it is clear that there was no doubt that the victim had sexual intercourse. Her own evidence is that she had been dragged into the bush by the accused and he entered her twice. The fact that she was dragged to the bush corroborated by PW2 who said that they were from the shops when they met the Appellant and he held the victim and led her to the bush. Medical evidence presented by PW6 showed that the victim had had sexual intercourse.

18. Having reconsidered the evidence in the trial court, I find that the element of penetration was proved.

19. The evidence on the age of the victim was even clearer. She stated that she was in standard 7 and that an age assessment had been done. PW5 produced the age assessment report which stated that the victim was 16 years old.

20. On the identification of the Appellant there was evidence that he was positively identified by the victim (PW1), H (PW2) and the victim's grandmother (PW3). PW1 said that they met the Appellant on a lonely section of the road. He dragged her to the bush. This testimony was corroborated by PW2 who was with PW1. PW2 pointed to their grandmother the bush where the two were and the grandmother (PW3) waited for them to emerge. There is evidence that there was an encounter between the grandmother (PW3) and the complainant and Appellant. According to PW3 she beat up the complainant and that the Appellant looked like he wanted to hit her (PW3) but he did not.

21. The Appellant in his defence talked about having carried two ladies on his boda boda and that a woman met and confronted the two ladies and beat them up. Although the Appellant denied being placed at the scene he appears to acknowledge that he encountered two girls and an enraged grandmother.

22. The trial court considered the Appellant's defence and dismissed it as a sham. I agree with the trial court that the Appellant's defence must be untrue. From my consideration of the prosecution evidence, he was positively identified. He lived in the neighborhood and was known to the victim, PW2 and PW3. The incident happened in broad daylight at about 3pm.

23. Turning now to the sentence, I observe that the Appellant was sentenced to 20 years imprisonment. It is trite that sentencing is the discretion of the trial court. The sentence provided for under **Section 8(4) of the Sexual Offence Act** is imprisonment for 15 years. In sentencing the Appellant, the trial court observed that he had threatened to kill the victim if she told anyone. The court moved on this basis to enhance the sentence to 20 years and to declare the Appellant a dangerous offender.

24. I have doubt however whether the allegation of the threat was proved or even made at all. I say so because according to the testimony of the grandmother (PW3), the Appellant and the victim emerged together from the bush. I would imagine that if he was a dangerous offender he would have escaped immediately he finished defiling the victim or immediately he saw the victim's grandmother. To the contrary he

seems to have stopped by as (PW3) beat up and interrogated the victim.

25. I would on the basis of the circumstances borne by the evidence reduce the sentence meted out to Appellant from 20 years to the maximum sentence of 15 years imprisonment. This term will run from the date of arrest being 5<sup>th</sup> September, 2017.

Orders accordingly

**Judgment delivered, dated and signed at Garsen this 12<sup>th</sup> day of June, 2019.**

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**R. LAGAT KORIR**

**JUDGE**

**In the presence of:-**

**The Appellant in person**

**S. Pacho - Court Assistant**

**Mr. Kasyoka - for Respondent**