



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 98 OF 2017

CHARLES ASEKA ASHIMALI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment, conviction and sentence of Hon. F. Makoyo– SRM

delivered on 4th August, 2017 in the Principal Magistrate’s Court at Butere

in Criminal Case No. 434 of 2013, Republic vs Charles Aseka Ashimali)

JUDGMENT

1. The appellant has appealed against his conviction and sentence of twenty (20) years imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006.
2. In this court the appellant has raised 8 grounds of appeal in his petition.
3. Ms. Rotich for the state has supported both conviction and sentence.
4. In ground 4, the appellant has faulted the trial court in failing to find that the complainant (PW1) was couched on what to tell the court in chambers. In this regard, the evidence of the complainant was taken after being subjected to a *vore dire* examination. As a result of that *vore dire* examination, the court found that she did not understand the nature of taking the oath. She therefore was not allowed to give sworn evidence. As a result, she was allowed to make an unsworn statement.
5. Furthermore it was her evidence that she was playing football at home, when the appellant approached her. He took her into the bush and covered her mouth. The appellant then: “Removed the thing he uses to urinate and put that thing inside me.” This was after he had removed his pair of shorts and pants of the complainant. It was also her evidence that her father was alerted who went to the scene of crime. The father of the complainant found the complainant and the appellant at the river. After he saw her father, the appellant escaped.
6. BA (initials of his name) was the father of the complainant (PW.A). He testified that on 17th October, 2013 at 4.30 pm, he was alerted by one lady (Leonida) that her daughter was being defiled. He rushed to the scene of crime and found the appellant in the act of defiling his daughter. The complainant’s father managed to arrest the appellant. In the meantime, members of the public responded and arrived at the scene. They took the appellant to the police station. It was the evidence of the complainant’s father that her daughter was born in 1999, a matter in respect of which he produced a birth certificate as exhibit 3.
7. While under cross-examination, the complainant denied that her evidence in court is not what she was told to tell the court. The evidence of the complainant’s father is that he arrested the appellant, while in the process of defiling the complainant. I therefore find no merit in ground 4, which I hereby dismiss.
8. In ground 5, the appellant has complained that he was kept in police cells for more than 24 hours, which he alleges was in contravention of the law. In this regard the evidence shows that the appellant appeared in court for plea on 19th November, 2013. The evidence of No. 237445 APC Felix Ndambiki (PW.2) is that he re-arrested the appellant, who had been subjected to mob justice. This was on November, 17, 2013 at 5.30 p.m. It seems that the appellant was not taken to court within 24 hours as required by the law. That is a matter for the civil court to determine, whether or not there was infringement of his right. It’s not for this court to do so. I therefore dismiss this ground of appeal.

9. In ground 6, the appellant has faulted the trial court for not informing him of his right to legal representation. I have perused the record of the proceedings. I find that the appellant was not informed of his right to legal representation. I also find from the record of proceedings that the appellant conducted an effective cross-examination. There is nothing on record to show that lack of legal representation prejudiced him. In the circumstances, I find that there is no merit in this ground of appeal which, I hereby dismiss.

10. In ground 7, the appellant has faulted the trial court in failing to consider the defence evidence and for believing the prosecution evidence. In this regard, the appellant gave sworn evidence and testified that on 17th November, 2013 he left home for Kisa Emalindi to attend a funeral. While en-route it started raining and for that reason he decided to return home early. On the way home he met four (4) persons who were unknown to him. These people accosted him and cut his fingers. Thereafter some ladies rescued him. One of those ladies claimed that the appellant was with her child. He was then taken to Khwisero police station and charged with this offence. While under cross-examination, he denied knowing as to why he was attacked.

11. In the judgment of the trial court, the appellant was positively identified and was caught red-handed in the act of defiling PW.1. The trial court found that his defence was a mere denial and was incredible. It found the evidence of the prosecution witnesses to be truthful.

12. The appellant gave sworn evidence and impressed the trial court as a witness who was not testifying truthfully. It is therefore clear that his defence was considered and was rightly rejected. In the circumstances, I find no merit in this ground which I hereby dismiss.

13. In ground 8, the appellant has faulted the trial court for failing to find that the case was not properly investigated. In this regard there is credible evidence of the complainant that she was defiled. The medical evidence of Belinda Malanya (PW6), who was a clinical officer was that she examined the complainant. She found the complainant to be fourteen (14) years old. Her other findings in respect of the complainant are as follows. She was confused and her clothes were dirty. There was mud on her blouse and her skirt was torn. There was a whitish substance on her vagina. She was in pain and her hymen was absent. She did not have any injuries. There were epithelial cells in her vagina walls which indicated that there was friction. She concluded that the complainant had been defiled. The P3 form in respect of her examination was produced as exhibit 2. It is important to point out that she was examined on the same day, when she was defiled. In the circumstances, I find no merit in this ground and therefore I dismiss it. I have re-assessed the entire evidence as a first appeal court. As a result, I find the appellant was convicted on sound evidence.

14. The appellant was sentenced to twenty (20) years imprisonment. In sentencing the appellant the trial court did not take into account that the appellant was first offender. It also did not take into account that there were people who depended on the appellant. In short, the trial court did not take into account the mitigating factors. I have considered both the aggravating and mitigating factors and I find the proper sentence is one of eight (8) years, which the appellant has now to serve.

Judgment signed, dated and delivered in open court at Kakamega this 5th day of September, 2019.

In the presence of the appellant and Ms. Rotich for the respondent.

J.M. BWONWONG'A

JUDGE