



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 12 OF 2018

BETWEEN

NEWTON MUGUNDA.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. M.L. Nabibya, SRM

dated 16th January 2018 at Hamisi Magistrates Court Criminal Case No. 1059 of 2014)

JUDGMENT

1. The appellant, **NEWTON MUGUNDA**, was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the *Sexual Offences Act* (“the Act”). It was alleged that on 12th November 2014 in Vihiga County, he intentionally caused his penis to penetrate the vagina of SI, a child aged 14 years old. He was however convicted of the offence of attempted defilement contrary to **section 9** of the Act.
2. The appellant was sentenced to 10 years’ imprisonment and now appeals against conviction and sentence. In his petition of appeal and written submissions, he contended that the evidence against him was contradictory and the conviction was based on uncorroborated evidence of a child. He also complained that the case proceeded in the absence of his lawyer thereby occasioning a miscarriage of justice.
3. As this is a first appeal, this court is required to examine all the evidence independently and reach its own conclusions as to whether to uphold the conviction all the time bearing in mind that it neither heard or saw the witnesses testify.
4. The complainant, PW 1, testified that she was 15 years old and on the material day, 12th November 2014 at about 6.00am, the appellant grabbed her, dragged her into a house after blocking her mouth and tying her hand and took her to a room. He tore her uniform and pants and started sexually assaulting her. When he heard people outside, he took her to a toilet and locked her inside while threatening to kill her if she screamed. PW 1 further recalled that people surrounded the toilet and released her. She was later taken to hospital.
5. On the same day, PW 2, who lived near the school which PW 1 attended recalled that he had been informed that a student had gone into the appellant’s house. When he asked the appellant whether there was student in the house, he denied it. He decided to check into the house and saw a girl in the house on the bed. He called out the appellant, who immediately took the girl to the nearby toilet. As he called the Head teacher, the appellant told him to remain silent about the issue as he would sort it out. PW 2 testified that the Head Teacher and other people came and found the girl.
6. The complainant’s aunt, PW 4, was informed of the incident and went to the school. She found PW 1 and the appellant being taken to the police station. PW 5, the complainant’s father, also arrived at the school where he found PW 1. PW 6, the Assistant Chief, who had also received a report of the incident also arrived at the scene where he found the crowd ready to lynch the appellant. He called police officers who came to take PW 1 and the appellant.
7. The Investigating Officer, PW 7, confirmed that the appellant was arrested and that PW 1 was taken to hospital for examination after being issued with a P3 medical form. The Clinical Officer, PW 3, who examined PW 1 on 12th November 2014 testified that PW 1 had torn uniform and she appeared depressed and in fear. On examination of the genital area, she found a white discharge and bruises on the outside. The hymen was open and had healed. She was of the view that there was partial or attempted penetration.

8. In his unsworn statement, the appellant denied committing the offence. He stated that on the material morning he did his usual work which was to sell bread. He stated that he met a person who claimed that he had a student in his house but he told him he did not. He complained that what happened was a grudge against him because he was a police informer in the market area.

9. Before I consider the other grounds of appeal that relate to the factual findings let me deal with the issues relating to the accused's representation by an advocate. He complained that he was denied the service of an advocate thus his right to counsel under **Article 50** of the Constitution was violated.

10. The record before the trial court shows that the appellant was represented by Mr Musiega, Advocate at the initial hearing. When the matter came up subsequently, the advocate did not attend court. No reason was advanced for this and the appellant did not raise any objection to the proceeds. In fact, the record shows that the appellant was always ready to proceed and at the end of the proceedings he made his defence. I also note that the petition of appeal was filed by the self-same advocate but he never attended court and the appellant was proceeded with this appeal. I therefore do not find any violation of the appellant's right to be represented in the circumstances.

11. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. "Penetration" under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

12. As regards the offence, I find that PW 1 gave a detailed narration of the ordeal she underwent in hands of the appellant. Her testimony was corroborated by PW 2 who knew the appellant and who saw PW 1 in the appellant's house and who also saw him take her to the toilet where he locked her up. The prosecution also produced physical PW 1's torn uniform and underpants in evidence which also corroborated PW 1's testimony. Finally, the appellant was arrested at the scene leaving no doubt that he had committed the felonious act.

13. The appellant's defence of a grudge does little to displace the prosecution case and in fact confirms that he met PW 2 that morning and that he was at the *locus in quo*. It was thus properly dismissed.

14. I would however disagree with the trial magistrate on the conviction of attempted defilement. In my view, PW 1 testimony established the fact of penetration. Further, the medical evidence showing a discharge and bruises on the outside of the genital area and an open hymen corroborated her testimony on penetration. However, and since the State did not cross appeal on this issue, I will not intervene.

15. Finally, the age of the complainant was proved by the age assessment report which showed that she was 15 years old. She was therefore a child.

16. I affirm the conviction and sentence and dismiss the appeal.

DATED and DELIVERED at KAKAMEGA this 3rd day of September 2019.

D.S. MAJANJA

JUDGE

Appellant in Person

Ms Ombega, Prosecution Counsel, instructed by the Director of Public Prosecution for the respondent.