



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 35 OF 2019

BENSON MULI KYENGO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

1. The appellant was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 29th June, 2018 at [particulars withheld] Location, Makueni Sub-County within Makueni County intentionally caused his penis to penetrate the vagina of MWW a child aged 13 years.
2. In alternative charge, he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars are that on the 29th June, 2018 at [particulars withheld] Location, Makueni Sub-County within Makueni County intentionally touched the vagina of MWW, a child aged 13 years with his penis.
3. He pleaded not guilty and thus matter went into full trial. He was convicted and sentenced to serve 20 years imprisonment.
4. He was unhappy with the instant above verdict thus lodged the instant appeal and set out 6 grounds of appeal namely:
 - (i) **That the learned trial magistrate erred in law and facts by convicting and sentencing him without considering that the complainant in this case was not tested via *voire dire* examination**
 - (ii) **That the learned trial magistrate erred in law and facts by not considering the contradictions and inconsistencies in the trial case which were in want of merit.**
 - (iii) **That the trial magistrate erred in law and facts by not considering that the case was not proved beyond reasonable doubt.**
 - (iv) **That the trial magistrate erred in law and facts by not considering that there was an existing grudge between the appellant and the family of the complainant.**
 - (v) **That the trial magistrate erred in law and facts by not considering the appellant's defence which failure to, in equal to neutral justice.**
 - (vi) **That the appellant wished to be furnished with trial proceedings records for more grounds before the hearing of this appeal.**
5. The parties agreed to canvass appeal via submissions, who filed the same.
6. The prosecution opposed appeal and relied on record. The appellant submitted that it is trite law that statement of the victim is of paramount importance. The court to be completely satisfied that the victim is telling the truth it must record the reasons for such belief since from the evidence tendered the victim after the act went on fetching water; there was no threat in her life.
7. He argues that, she went on ahead being silent on the matter until the following day when they went to the river to wash clothes. If this was the true status of the matter she should have informed her auntie immediately.
8. He contests that he was positively identified arguing that, although the evidence against the appellant is that of recognition as opposed to identification it was not safe, he cites the case of **Ali Mlako Mwero vs Republic [2011] eKLR** the Court of Appeal expressed itself as

follows:

“The identification of the appellant in this case lay not only on the visual features observed by Mesalim but also on his recognition by that witness. We agree with Mr. Oguk, that in either case, the evidence ought to be tested with utmost care because it is not unknown for a witness to be honest but mistaken. So may a number of them”.

9. See **Roria vs Republic [1967] EA 583., R vs Turnbull (1976) 3 ALL E.R 549 Maitanyi vs Republic (1986) KLR 198, Rex vs Shabani Bin Donaldi (1940) 7 EACA 60.**

10. He contends that, there was no evidence directly linking him to the offence. He submits that there was reasonable doubt as to whether it was in fact him who defiled the complainant. He argues that, the prosecution's duty is to prove all the elements of the offence of defilement beyond reasonable doubt. He relies on **JOO Vs Republic [2015] eKLR, Mrima J.** held that:

“It is not lost to this court that the offence which the appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This court holds the view that it is better to acquit ten guilty persons than to convict one innocent person.”

11. The first trial court's duty is to evaluate the evidence tendered and make its own conclusion. See the case of **Okeno vs Republic.**

ISSUES ANALYSIS AND DETERMINATION:

12. The singular issue herein is; ***whether the prosecution proved its case beyond reasonable doubt?***

13. On complainant's age;

14. The age of a victim of a sexual offence has been held by the courts to be crucial. In **Hudson Ali Mwachongo vs R (2016) eKLR** the court held thus;

“the importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid...”

15. In the present case, the charge sheet indicates the complainant's age as 13 years. To prove her age, PC Robert Ngau, PW3 as the Investigating Officer herein produced her birth certificate, Exhibit 1 which indicates the 24/04/2005 as her date of birth. In **Hudson Ali Mwachongo (Supra)**, the court further observed as follows;

“...it is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim...”

16. Thus the complainant's age to wit, 13 years was reasonably proved.

Whether penetration was proved?

17. Penetration is defined by Section 2 of the Sexual Offences Act as *“the partial or complete insertion of the genital organs of a person into the genital organ of another person”* While testifying of the incident, PW1 told the court that the assailant removed her pant, placed it on the ground and slept with her by inserting his penis inside her vagina.

18. In corroborating her testimony, Dr. Emmanuel Loiposha testified that an examination of PW1's genitalia revealed a freshly broken hymen with a whitish discharge. Her vaginal walls were hyperemic meaning reddening to which he concluded that the freshly ruptured hymen and hyperemic vaginal walls was highly suggestive of a successful sexual penetration.

19. The P3 form further corroborates the doctor's testimony in chief. The PRC Form which was filled on 30/06/2018 but erroneously stamped with a stamp dated 02/06/2018 indicates that the patient had changed clothes, the genital examination findings were that no bruises were seen on the outer genitalia, her vagina was hyperemic, her hymen, freshly broken. The form further indicates that epithelial and pus cells were present on microscopy.

20. In view of the foregoing, there was no doubt in courts mind that PW1's genital organ was penetrated within the definition stipulated in Section 2 of the Act and to that end; thus finding that penetration was proved to the required standard.

21. The last issue for determination was whether the appellant person was the perpetrator? PW1 told the court that the incident took place at 4pm. She testified that she was at the river fetching water when someone appeared behind her, grabbed her hands lay her on a ground with sand and inserted his penis inside her vagina.

22. She identified the assailant as the appellant person in the dock. Her testimony was corroborated by PW2 who told the court that the following day while washing at the river, PW1 saw the appellant person, pointed at him and identified him as the person who had defiled her.

23. From his defence in chief, appellant admits having seen PW1 on the material date but denies committing the offence. He told the court that the case is fabricated ostensibly by someone out to fix him. His witness further denied seeing PW1 on the material date and further denied seeing her at the river the following day.

24. The witness further denied being apart from the appellant at any point of the material date and the following day when PW1 is said to have pointed at the appellant person.

25. The therefore finds no merit on appeal and dismisses the same. The court makes the following orders;

i) Appeal is dismissed, conviction is upheld and sentence confirmed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

.....

C. KARIUKI

JUDGE