



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 82 OF 2018

DANIEL WAMBUA WENGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence in Kithimani Senior Resident Magistrate's Court (Hon. G.O. Shikwe, SRM), in Criminal Case No. 28 of 2016 vide judgement delivered on 6.4.2018)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL WAMBUA WENGA.....ACCUSED

JUDGEMENT

1. This is an appeal from the conviction and sentence of Hon. G.O. Shikwe, Senior Resident Magistrate in Criminal Case No. 28 of 2016 on 6.4.2018. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8 (2) of the Sexual Offences Act No. 3 of 2006.

2. When the matter came up for trial, the prosecution presented 6 witnesses so as to establish the guilt of the appellant. Pw1 was AN and after conducting a Voire-dire examination on the girl, who testified that she is a 12 year old class 4 pupil at [particulars withheld] Primary school. The court found that she was of sufficient intelligence and capable of understanding the meaning of an oath. She thus gave a sworn statement. She testified that she was 12years old and on 22.5.2016 around 9.00 a.m., she had gone to fetch firewood when she found the appellant at the site cutting grass and who requested him to assist him ferry some firewood to his house nearby whereupon he followed her while armed with a panga and locked the door behind her at his said house then he threatened to cut her if she screamed. It was her testimony that he undressed her and proceeded to rape her. His neighbours came and found him undressed and they alerted her brother who called her father and she was taken to Ndithini Dispensary where she was treated. She presented a P3 form and a PRC form as well as medical treatment notes that were marked for identification.

3. PW2 was JMM. He testified that the complainant is his daughter who was born in April 2003 and presented the health card. He told the court that on 22.5.2016 while at home the complainant informed him that the appellant had defiled her and on cross-examination, he stated that he found the appellant half naked and pulling his zipper on and who confessed to him that he had raped the complainant.

4. Pw3 was WK who testified that he is a 17 year old form 2 student and recalls that on 22.5.2015 at 9.00 am he went to the appellant's farm and entered his house and when he peeped through the iron sheet he saw that the complainant had lifted her skirt to the waist then he alerted his friend who also peeped into the said house. Later the girl noticed their presence and she opened the door whereupon the appellant came out with no shirt and he was zipping up his trouser. They then alerted the girl's parents.

5. PW 4 was Bernard Munyao who testified that on 22.5.2016 while looking for pasture together with Pw3 he saw the appellant enter the house together with PW1 and Pw3 went to investigate and he called him and he peeped and saw the appellant had no shirt and trouser and the complainant was half naked. He told the court that on hearing them, the complainant came out while the appellant followed without a shirt. They then called Pw1's brother who alerted her parents.

6. PW 5 was No. 44647 PC Hussein Mohammed, attached at Masinga police station. It was his testimony that on 22.5.2016 while on duty at Ndithini Post, AP's from Mananja came to the office in the company of members of the public and brought the appellant. He stated that the AP's claimed that the appellant had defiled Pw1 on 22.5.2016 and handed over a panga to him. He booked the report on the OB and took the complainant to Ndithini Health Centre and on 23.5.2017 he escorted her to Masinga Hospital where at P3 form was filled and the appellant

was charged.

7. Pw6 was Edwin Mutembei, a clinical officer based at Masinga Hospital. He testified that he filled the P3 form in respect of the complainant and noted that her hymen was absent and at the time of examination on 23.5.2016 she had a history of defilement on 22.5.2016 at 9.00 am. He formed the opinion that the complainant had been defiled. He also examined the perpetrator who had pus cells in his urine and his shirt was soiled with blood stains and his right hand finger had a cut wound. The prosecution closed its case.

8. The trial court found that the prosecution had established a prima facie case and the appellant was put on his defence. He opted to remain silent.

9. The appellant was found guilty and convicted of the offence of defilement and sentenced to twenty (20) years imprisonment. The appellant was aggrieved and raised the following grounds of appeal namely:

- a) That the trial magistrate erred in points of law and fact by failing to find that the prosecution did not prove the case beyond reasonable doubt.
- b) That the prosecution's case had several contradictions.
- c) That the appellant's defence was not considered.

10. The appeal was canvassed vide written submissions. It is the appellant's case that the prosecution did not prove its case beyond reasonable doubt. It is also his case that the trial court went into error in relying on a defective charge sheet and that it wrongly invoked the voir dire examination on the complainant and thus should not have allowed her evidence. Further he submitted that the age of Pw1 was not proven. He concluded that his appeal be allowed, the conviction quashed and the sentence set aside.

11. The state submitted that two of the elements of defilement were proven. Age was proven via the complainant's health card and so was penetration proven. On the issue of defective charges, counsel submitted that Section 214(2) of the Criminal Procedure Code provides that a variance between the charge and the evidence is not material since the defectiveness is curable under Section 382 of the Criminal Procedure Code. On the issue of the voir dire, he submitted that there is no format for administration of the same. He submitted that there was no proof of penile penetration and he thus conceded to the appeal in respect of defilement and invited the court to make a decision that the offence of indecent act with a minor was proven.

12. This being a first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyse the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses.

13. The court has carefully considered the petition of appeal and the amended petition that was filed without requisite leave as well as the submissions presented. The grounds of appeal and the amended grounds may be collapsed into two grounds:

1. That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;

2. That the trial magistrate erred in failing to conduct a proper voir dire;

14. The issues for determination are whether the elements of the offence of defilement were proven to the required standard and the ancillary issue of procedural infractions in the judgement and their effect on the case. In cases of defilement the following are to be proven:

1. ***The age of the child.***
2. ***The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and***
3. ***That the perpetrator is the Appellant.***

15. Having considered this appeal and the rival submissions, it is undisputed that the complainant was a person below 18 years as she testified that she was aged 12 years and a standard 4 pupil at [particulars withheld] primary school and was born in 2004. There is on record a health card that was produced by Pw2 and the appellant did not object to its production. However the appellant seems to challenge the fact that the evidence of Pw1 and Pw2 are contradictory because Pw1 says she was born in 2004 whereas Pw2 testified that she was born in 2003. In the case of in **Musyoki Mwakavi v Republic [2014] eKLR** held that: _

"...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense..."

16. Whilst the best evidence of age is the birth certificate followed by age assessment, Pw2's evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant. Here, the health card was produced that indicated that she was born on 22.3.2004, which was not discredited by the appellant and thus the estimated the age of the complainant was 12 years old. Even though the complainant's parent indicated the year of birth as 2003 I find the discrepancy not material and did not affect the weight of the evidence since the age would still range between 12 and 15 years pursuant to section 8(3) of the Sexual Offences Act. I am satisfied that the issue of the age of the complainant was proved by the prosecution.

17. On the issue of penetration, this was established by the evidence on record as indicated on the P3 form, the PRC form and the account of the victim plus the clinical officer from Masinga Health Center.

18. P3 form was filled by Pw6. He testified on the physical examination carried out on the victim and testified on the contents of the document. He also testified the he relied on the PRC form and the Appellant did not object to its production. He concluded that the victim was defiled and signed the P3 form. The P3 form indicates that, “*the hymen noted absent*. To convict the appellant, there ought to have been no doubt in the mind of the court that the appellant was responsible as well as rule out other causes or explanations to the condition of the body of the complainant. **Maraga and Rawal, JJA**, as they then were), in **P. K.W v REPUBLIC [2012] eKLR** took this view.

19. The trial court took into account the medical evidence in totality and not in isolation of other factors surrounding the case.

20. The victim testified that 22.5.2016 around 9.00 a.m., she had gone to fetch firewood when she found the appellant at the site cutting grass whereupon he followed her with a panga and locked the door behind her at home then he threatened to cut her if she screamed. It was her testimony that he undressed her and proceeded to rape her and later his neighbours came and found him undressed and they called her brother who called her father and she was taken to Ndithini Dispensary where she was treated. Pw3 and Pw4 saw the appellant undressed and that they saw the appellant and the complainant going to the appellant’s house together. The Appellant was a person known to the complainant and thus she recognized him. The evidence of Pw2, and Pw3 placed the appellant at the scene of the crime. The incident took place during the day and that there was no question of a mistaken identity. Further the appellant was caught in flagrant delicto and arrested at the scene of crime. The complainant was examined within 24 hours and the defilement confirmed.

21. The appellant kept silent in defence. Even though he did not say anything the burden of proving his guilt still lay upon the prosecution to discharge.

22. From the foregoing, I did not have the benefit of seeing the witnesses testify. However from the proceedings and the court record, the trial court was satisfied of the evidence against the appellant. The learned trial magistrate rightly relied on Section 124 of the Evidence Act and the case of **Mohamed v R (2006) 2 KLR 138** in believing the evidence of the complainant and I see no reason to disturb the finding. In considering the surrounding circumstances that the appellant and the victim were well known to each other and therefore his identification was more of recognition as was observed in **FRANCIS MUCHIRI JOSEPH – V- REPUBLIC [2014] eKLR** where the court had this to say on recognition:

“In LESARAU – v-R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. In R-V-Turnbull,(1976) 3 All ER 551, Lord Widgrey CJ observed that the quality of identification evidence is critical: if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger. He went on to state:

“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

23. In this regard penetration was proven in terms of Section 2 of the Sexual Offences Act and the appellant was properly identified and thus the elements of the offence were established. The appellant has raised the issue that the voir dire was not properly conducted. When a court is faced with a child which is stated to be 14 years and below, according to case law (**Kibageny Arap Korir v R [1959] EA 92-93** the court must first establish whether the child is possessed of sufficient intelligence to justify the reception of that evidence and understands the duty of speaking the truth. In case the child is intelligent enough to give evidence but does not understand the duty of speaking the truth, his or her evidence may be taken without taking the oath but no conviction can follow unless, such evidence is corroborated by some other material evidence in support of it implicating the accused (**Section 19 of the Oaths and Statutory Declarations Act**). But if the child understands the duty to speak the truth, then the oath is administered before taking evidence from him or her.

24. There is no statutory procedure or established uniform format that is followed by judicial officers to help them decide on whether the child should testify on oath or not or not at all since determining the intelligence of the child is left to the good sense of the trial judge or magistrate alone. It is common knowledge that children develop in stages and they develop a sense of right and wrong, and will be desperate for praise and approval. It is important to test the intelligence of a child and from the evidence on record, Pw1 had a sense of understanding and indeed was able to identify the person who hurt her and the trial magistrate rightly exercised his discretion as to whether the child should take oath or not.

25. Having gone through the law and legal principles above, the record does reveal the questions that were asked and answers recorded therefore a voir dire was conducted. The basis of the learned Magistrates opinion to swear in Pw1 is evident from the record as per the questions and answers to the questions. There is evidence of dialogue which convinced the trial magistrate that the witness was possessed with sufficient intelligence and understood what an oath is hence the appellant’s ground of appeal thereon must fail.

26. From the evidence on record, I am satisfied that the same is sufficient to sustain a conviction against the appellant who due to the evidence on record has been placed at the scene of the crime on the material date. The conviction of the appellant was therefore sound.

27. Section 8 (3)of the Sexual Offences provides that :

“(2) A person who commits an offence of defilement with a child aged between 12 and 15 years shall be liable on conviction to a term of imprisonment of not less than 20 years.”

28. From the evidence on record, and the analysis of the submissions, the victim was 12 years at the time of commission of the offence and therefore the mandatory sentence of twenty years was the minimum possible in law.

29. In the result, I find that the prosecution did prove its case beyond all reasonable doubt. The appeal has no merit and is dismissed. The appellant's conviction and sentence is upheld.

It is so ordered.

Dated and delivered at **Machakos** this **3rd** day of **October, 2019**.

D. K. Kemei

Judge