



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 39 OF 2018

(From Original Conviction and Sentence in Criminal Case No. 23 of 2017 by the Senior Resident Magistrate's Court at Butere)

PMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. F. Makoyo, Senior Resident Magistrate, of defilement contrary to section 8(1), as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006, Laws of Kenya, and was accordingly sentenced to life imprisonment. The particulars of the charge against the appellant were that on 31st October 2017 at [particulars withheld], Kakamega County, he intentionally and unlawfully inserted his genital organ, namely penis to penetrate into the genital organ namely vagina of PA, a child aged four years.

2. He had also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the alternative charge were that on the same date and at the same place stated in the main count, he had intentionally and unlawfully committed an indecent act with the said child.

3. There was also a second main count, of deliberate transmission of a life threatening sexually transmitted disease contrary to section 26 (1) (a) of the Sexual Offences Act, the particulars being that at the time of the committing the offences charged in Count I and the alternative charge, having knowledge that that he was infected with HIV, a life threatening sexually transmitted disease, he intentionally and willfully had unprotected sexual intercourse with the complainant and infected her with the said disease.

4. The appellant pleaded not guilty to the charges before the trial court, and a full trial was conducted. The prosecution called six (6) witnesses.

5. IN was the first to take the witness stand, as PW1. She was the mother of the complainant, PA. She testified that she had left her children at home when she went to a dispensary. When she came back she found a crowd at her compound, and when she enquired she was informed that her daughter had been defiled by the appellant who was their neighbour. She examined the complainant and found dirt in her vagina. She made a report to the appellant's mother, and with her they went out looking for him until they got him. She made a report to the village elder. She afterwards took the child to hospital and reported the appellant to the police. The child's underwear was found at the appellant's house. PW2, JN, a sister of the complainant, testified as PW2, she gave sworn evidence and was cross-examined by the appellant. She explained that she and other children, including the complainant, were playing outside, when the appellant, who was a neighbour, came and lured the child away to his house. She later found the child on the appellant's bed, crying, with the appellant's clothes on the floor. She retrieved her sister from the appellant's house where she left her underwear. Before she got in the appellant's house she had found him outside, and he had tried to prevent her from accessing the house. She said that she had not been told what to come and tell the court. LM (PW3) gave unsworn evidence. He talked of how he left the complainant at the appellant's house. He heard her crying from inside the appellant's house and when he went there he found her there and took her home together with PW2. WE (PW4) was the clinical officer who presented the medical evidence. He stated that the complainant was brought to hospital on the material day with a history of having been defiled. He examined her, and found her underwear with blood spots. Her vaginal entrance was red; the hymen was intact but it had bruises. He treated the child and discharged her. He found epithelial cells indicative of forceful fiction. He also examined the appellant and concluded that there was no medical link between the appellant and the complainant. He stated that after tests the appellant was found to be HIV positive, while the complainant was found to be HIV negative and was given medicine to prevent contracting the virus. Thomas Ingalls, testified as PW5. He was the village elder to whom the first report was made. He was the one who had arrested the appellant. He later escorted the child for medical care, and the appellant to the police. Police Constable Miriam Chalagat (PW6) received the defilement report, arranged for examination of the child by the doctor, recorded statements from the witnesses, visited the scene and generally conducted the investigations.

6. The appellant was put on his defence. He gave an unsworn statement and did not call witnesses. He merely denied the offence.

7. After reviewing the evidence, the trial court convicted him of the main charge, and sentenced him as stated in paragraph 1 of this judgement. He was acquitted for the charge of knowingly infecting the child with HIV.

8. Being dissatisfied with the sentence the appellant appealed to this court and raised several grounds of appeal. He largely averred that the trial court proceeded with his trial without proper quorum, that the appellant was not subjected to corresponding medical examination with the victim as required under section 36 of the Sexual Offences Act, that the court found that there was penetration yet there was shaky evidence on that fact, that the age of the victim was adequately proved, and that his defence was rejected without proper evaluation.

9. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of **Okeno vs. Republic (1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

10. The appeal was canvassed on 26th June 2019. The appellant relied on written submissions that he had placed on record, while Mr. Ng'etich, Senior Prosecution Counsel, made oral submissions.

11. In his written submissions, the appellant pointed out inconsistencies in the oral testimonies which he submitted made the state evidence doubtful, the provisions of section 36 of the Sexual Offences Act were not complied with, and that the medical evidence did not link him to the offence. Mr. Ng'etich submitted that the state had proved all the elements for the offence of defilement, that is to say penetration, age of the victim and identity of the perpetrator. He submitted that the testimonies of the prosecution witnesses placed the appellant squarely at the scene of the crime.

12. I will consider the issues raised by the appellant one by one, starting with whether the trial magistrate conducted a trial without proper quorum. He did not elaborate in his written submissions on this. He did not explain what he meant by quorum. I suppose that he meant Coram, or the fact that the court was not properly constituted at the time of the trial. For the purposes of a criminal trial a court is properly constituted when the presiding judicial officer is present in open court alongside his assistant, the state prosecutor and the accused. I have closely perused through the trial court record. I have not come across any minute which suggests that the trial magistrate sat without his court assistant or conducted proceedings in the absence of the appellant or the state prosecutor. In short it has not been established that the trial court conducted business when it was not properly constituted.

13. The second issue turns on compliance with section 36 of the Sexual Offences Act. The appellant complains that he was not subjected to medical examination in accordance with that provision. The provision alluded to states as follows:

“36. Evidence of medical, forensic and scientific nature

(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.

(3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.

(4) The dangerous sexual offenders' databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.

(5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.

(6) An appropriate sample or samples taken in terms of subsection (5)—

(a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; and

(b) in the case of blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.

(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against—

(a) the State;

(b) any Minister; or

(c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.

(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less than fifty thousand shillings or to both.”

14. My preliminary understanding of section 36 of the Sexual Offences Act is that the same is not in mandatory terms. It is phrased in very permissive terms. It leaves the court discretion to direct the taking of samples for forensics. My understanding of the provision is, therefore, that there was no obligation on the part of the trial court to direct that such samples be taken, since such directions could only be made at the discretion of the court in circumstances where it deemed it fit.

15. In *George Muchika Lumbasi vs. Republic* [2016] eKLR, it was stated that section 36 of the Sexual Offences Act does not make medical examination mandatory except where the court thinks it is appropriate in the circumstances of the case to subject an accused person to such examination. It was emphasized that such examination is discretionary under section 36. See also *Evans Wamalwa Simiyu vs. Republic* [2016] eKLR and *Edwin Maiyo Kandie vs. Republic* [2019] eKLR.

16. In any event, the law has been settled that despite section 36 of the Sexual Offences Act, sexual assault is proved not by medical examination, but by evidence adduced at the trial. The evidence of the victim and that of corroborative witnesses or circumstantial evidence is usually enough to establish sexual offences such as rape and defilement. The position was stated by the Court of Appeal in *Fappyton Mutuku Nguu vs. Republic* [2014] eKLR, where it was said that medical evidence was usually not necessary. A similar position was taken in *AML vs. Republic* [2012] eKLR, *Kassim Ali vs. Republic* [2006] eKLR, and *George Muchika Lumbasi vs. Republic* (supra), *Robert Mutungi Muumbi vs. Republic* (2015) eKLR and *Williamson Sowa Mbwanga vs. Republic* (2016) eKLR, among others.

17. The third issue raised was that the evidence on penetration was shaky. The minor complainant did not testify. She was said to be just four years of age. The witnesses who came immediately to the scene did not describe the condition of the complainant. I am talking about PW2 and PW3. These were child witnesses. They did not appear to have had physically examined the minor to confirm whether or not she had been defiled. PW1, the mother of the complainant, came to the scene not long after the incident. She examined her, what she noted was that she had dirt on the vagina. The only evidence that could assist in determining whether or not there was penetration was that of PW5, the clinical officer who examined and treated the victim. He noted that the underwear that the minor had had spots of blood. The vaginal opening was reddish and had some bruises. Laboratory tests showed presence of epithelial cells, which was indication of forceful friction. He found her hymen to be intact.

18. What constitutes penetration is defined in 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. The Court of Appeal in *Mark Oiruri Mose vs. R* [2013] eKLR, stated that the sexual act need not be fully complete, it would suffice that there is penetration whether only on the surface the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ. In *Erick Onyango Ondeng vs. Republic* [2014] eKLR, the same court stated that in sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence, and that it was not necessary that the hymen be ruptured. See also *GOA vs. Republic* [2018] eKLR. The medical evidence shows that there was interference with the genital organ of the minor, there is, therefore, material upon which it can be concluded that there had penetration.

19. The fourth issue was that the age of the minor was not adequately established. The record indicates that her mother, PW1, put her age at four years old, having been born on 5th May 2013. PW4, the clinical officer who attended to her, put her age at three years and nine months. The medical records from Butere County Hospital put her age at three years and nine months. The P3 Form relating to her placed her age at four years. I am not persuaded that the age of the complainant was not properly established. Her mother, PW1, was the person best suited to state her age. Medical personnel who handled her put her age at the same bracket with her mother. I do not think that much turns on this.

20. The next issue was that his defence was not considered by the court. I note that he gave an unsworn statement. It was stated by the Court of Appeal in *May vs. Republic* [1979] eKLR, that an unsworn statement was strictly not evidence and the rules of evidence could not be applied to it. It was of no probative value. Its potential is persuasive rather than evidential, and for it to be of any value it must be supported by the other evidence recorded in the case. In *Odongo vs. Republic* [1983] KLR 301, it was said that the unsworn statement of an accused person was not evidence. That then clearly indicates that his unsworn statement was of no value, and the trial court was not obliged to consider it. See also *Rashid Wachilu Kasheka vs. Republic* [2015] eKLR and *Mwangi vs. Republic* [2006] 2 KLR 94.

21. The other issue touched on inconsistencies in the evidence of the state witnesses. I have gone through the record and noted that the inconsistencies alluded to by the appellant were minor and did not go to the core of the matter. It was said in *Twehangane Alfred vs. Uganda* [2003] UGCA 6, the court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case. It was said in *Richard Munene vs. Republic* [2018] eKLR that not every inconsistency or contradiction is material.

22. The last issue he raised was that the medical record did not link him to the offence. PW4, the clinical officer, testified that he subjected the appellant to an examination a day after the incident. He did not find any medical link between the appellant and the victim. Did that exonerate him of the crime? I would reiterate what I have stated in paragraph 16 of this my judgment, that sexual assault need not be proved by medical examination or evidence, for it can be established through the testimonies of the witnesses, so long as the same are credible, reliable and probative.

23. The prosecution submitted that the offence of defilement was established to the extent that the state proved the age of the complainant, the fact of penetration and the appellant was identified as the perpetrator of the crime. What needs to be proved for the purposes of defilement was stated in *Dominic Kibet Mwareng vs. Republic* [2013] eKLR in the following terms that -

‘The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.’

24. I have already addressed the question of the age of the victim and penetration. I have concluded that the age of the complainant was properly established, and that penetration had been established. The only issue remaining is whether the appellant was in any way connected to the alleged crime.

25. The principal witnesses were PW2 and PW3. These were the persons who were on the ground at the time of the alleged commission of the offence. Both witnesses placed the appellant at the scene and put him and the complainant together in terms of their having seen the two together. They also placed the victim at the house and bed of the appellant. The evidence that emerged was that the appellant was a person well known to them as he was their neighbour. That would mean that the appellant was at the scene together with the victim and there was opportunity for him to commit the offence. The two witnesses did not place any other individual, apart from the appellant, at the scene of the crime.

26. From the analysis above, it is clear that the appellant and the victim were located together at about the time the alleged offence was committed and there is material to establish that the child in question was of the age indicated in the charge. There is unequivocal evidence of penetration, it would be my conclusion that the offence of defilement was established, and, therefore, the court properly convicted the appellant of the offence under section 8(1) as read with section 8(2) of the Sexual Offences Act.

27. In view of everything that I have said above, it is my finding that the appeal herein has no merits. I shall accordingly dismiss it, uphold the conviction and confirm the sentence.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9th DAY OF October 2019

W MUSYOKA

JUDGE