



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 158 OF 2016**

**DAVID WANJOHI NDUNGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....STATE**

*(Being an appeal from the Judgment of Honourable F. Muguongo Resident Magistrate, delivered on 30<sup>th</sup> September, 2016 in Nakuru Chief Magistrate's Court Adult Criminal Case No. 162 of 2013)*

**JUDGMENT**

1. The Appellant, David Wanjohi Ndun'gu, was charged before the Nakuru Chief Magistrate's Court with the offence of defilement Contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 12<sup>th</sup> day of August 2013 at Tumaini Trading Centre in Milangine District within Nyandarua County intentionally and unlawfully committed an act by inserting a male genital organ (penis) into the female genital organ (Vagina) of JM a child aged 13 years which caused penetration.
2. The Appellant faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars, venue and victim are the same.
3. The Appellant pleaded not guilty and the Prosecution called four witnesses. When put on his defence, the Appellant gave an unsworn statement. At the conclusion of the trial, the Learned Trial Magistrate found the main count had been proved beyond reasonable doubt and convicted the Appellant and sentenced him to twenty years imprisonment.
4. The Appellant is dissatisfied with the conviction and sentence and has appealed to this Court raising four broad grounds:
  - a. That there was inconsistency in the medical evidence;
  - b. That the Prosecution witnesses were incredible; and
  - c. That a crucial witness did not testify.
5. As a first appellate Court, the Court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it neither saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190***.
6. I will briefly rehash the evidence that emerged during the trial. The Complainant testified first after the Learned Trial Magistrate duly concluded through a voir dire that she understood the meaning and nature of oath. She told the Court that she knew the Appellant because he was a neighbour and used to work at a restaurant known as Genesis at Tumaini Centre. She knew him as Wanjohi.
7. She testified that her older friend, Wangui, called her and went with her to Wanjohi's. Wangui convinced her to spend the night there. The Complainant testified that at first she declined because she was afraid about her mother's reaction. However, Wangui convinced her that she would spend the night at Wanjohi's house too – and that the two of them would sleep on the couch.
8. However, the Complainant testified, when she awoke in the middle of the night, she found herself in the Appellant's bed sans her clothes. She said that the Appellant then had penetrative sex with her without her consent. She said that the Appellant warned her with dire consequences if she dared to scream.

9. The Complainant remained in the Appellant's home until the evening of the following day. It would appear that it was her mother who found her in the Appellant's home at around 5:00pm. She immediately reported to the Mirangine Police Station and took the Complainant for medical check up at Mirangine Health Centre. Later, the Complainant was taken to Ol Kalau Hospital for the P3 Form to be filled out.

10. At the Ol Kalau Hospital where the Complainant was taken, she was examined by Danson Maina. The Clinical Officer found that both the labia majora and labia minora were inflamed; the hymen was old broken; and had a foul smelling discharge in her vagina. He saw pus cells but no spermatozoa. He concluded that the Complainant had had penetrative sex. He produced the treatment notes, PRC Form and the P3 Form which had been duly filled.

11. The arresting officer was APC Michael Muthuki. He testified as PW2. He told the Court that on 14/08/2013 he was at Tumaini Shopping Centre with a fellow officer, APC Kosgei when they heard screams and shouting. They quickly headed to where the commotion was coming from. They found a crowd in hot pursuit of the Appellant. The crowd was shouting that he was a rapist. He had already been injured by some in the crowd. APC Muthuki and his colleague rescued the Appellant and escorted him to Tumaini Police Post. There, the Complainant's mother, RW and the Complainant went and reported what had happened. APC Muthuki testified that they took both to Ol Kalau Hospital for check up and treatment; the Appellant for a head injury he had sustained from the crowd; the Complainant for examination of the claims that she had been defiled. The following day APC Muthuki escorted the Appellant to Mirangine Police Station.

12. It was Corporal Musa Kiptum Koech who received the report at Mirangine Police Station and became the Investigating Officer in the case. After conducting his investigations, he formed the opinion that the Complainant had been defiled. He issued the P3 Form and referred the Complainant and her mother to hospital. Later on, he took the Complainant for age assessment. He produced the Age Assessment Report. It revealed that the Complainant was between 13-14 years old.

13. In his unsworn testimony, the Appellant denied that he ever defiled the Complainant and only gave an account of when he was arrested. His theory was that he was arrested for no good reason.

14. After analysis of the evidence and the elements of the offence of defilement, the Learned Trial Magistrate was persuaded that the Prosecution had proved its case beyond reasonable doubt and convicted the Appellant.

15. The Appellant filed Written Submissions in support of his appeal.

16. The State opposed the appeal. Ms. Nyawira, the Prosecutor, submitted that there was sufficient evidence to convict; that the age of the minor was properly established with the age assessment report as being between 13-14 years old. She further submitted that the identity of the Appellant was equally established; that the Complainant knew the Appellant before the incident since he worked in a restaurant in their neighbourhood.

17. Finally, Ms. Nyawira argued that penetration was established through the medical evidence of PW3 and the three medical documents he produced. It was also proved through the oral testimony of the Complainant.

18. The Learned Trial Magistrate, upon the conclusion of the case, considered the evidence before him under three headings which form the elements of the charged offence of defilement. These are:

- a. Age of the victim;
- b. Proof of penetration; and
- c. Positive identification of the Accused as the assailant who unlawfully caused the penetration.

19. In her judgment the Learned Trial Magistrate concluded that JM was thirteen years old a conclusion based on from her testimony as well as the Age Assessment Report produced as Exhibit in the case. I find no reason to fault this finding by the Learned Trial Magistrate: the oral evidence of the Complainant coupled with the Age Assessment Report established the age of EG beyond reasonable doubt.

20. The Learned Trial Magistrate analysed the element of penetration as defined in the Sexual Offences Act. She made a finding that the medical evidence was conclusive that there was penetration of EG's genitalia. In my view, the *viva voce* evidence of JM; the evidence of the Clinical Officer; the P3 Form produced as well as the testimony of PRC and Treatment notes produced all mutually reinforce each other to establish beyond reasonable doubt the fact that JM was, indeed, defiled. The Learned Magistrate who heard and saw JM believed her and I have no reason to impugn that finding.

21. On appeal, the Appellant argued that the medical evidence was inconsistent and was not sufficient to sustain the charge. His complaint is two-fold. First, he says that the Complainant testified that she had not had any other sexual encounter yet the Clinical Officer found an "old broken hymen" indicating that the Complainant had been sexually active. Second, he says that there was mention of the Complainant being pregnant and having contracted gonorrhoea but this was not borne out by the medical documents. Neither of these complaints are availing to the Appellant. It may well be true that the Complainant had had sexual encounter before – but that does not detract from the cogent evidence that the Appellant defiled her on this one instance. The question on trial was not whether the Complainant had had previous sexual encounters; it was whether the Appellant defiled the Complainant on 12/08/2013. As for the evidence of STD and pregnancy, they may have been additional evidence of penetration, but the evidence on record already sufficiently proves penetration beyond reasonable doubt.

22. The Appellant also complains that it was fatal that the mother of the Complainant did not testify. He additionally complains that Wangui who reportedly lured the Complainant to his house should also have been charged. It is true that under the authority in ***Bukenya & Others v Uganda [1972] E.A. 549*** the prosecution has a duty to call all witnesses that are necessary to establish the truth even though their

evidence may be inconsistent. Where a material witness is not called, the Court may infer that the evidence of that witness would have been adverse to the Prosecution. However, this inference is only drawn where the prosecution evidence is weak and inadequate to support a conviction. It must first be established that the witness who was not called was material and essential; there is no duty to call a superfluity of witnesses to prove a particular point. See: *John Waweru Njoka v R Court of Appeal at Nyeri Criminal Appeal 115 of 2001 (2005) KLR 175* and *Bare Mohamed v R High Court At Garissa Criminal Appeal No. 106 of 2014*.

23. In the present case, I am not persuaded that the Complainant's mother was a "material and essential" witness to prove the Prosecution case. She arrived at the scene after the defilement and her only testimony would have been to corroborate the Complainant's evidence about what they did after the defilement. The Complainant's evidence in this regard is sufficient. Neither is Wangui's testimony or prosecution necessary to establish guilt in this case.

24. Having reached these conclusions, it follows that the appeal herein must fail. It is, consequently, dismissed. The conviction is hereby affirmed.

25. As for sentence, the Appellant was imprisoned for twenty years. This is the minimum sentence allowed by the law upon conviction for an offence contrary to section 8(1) as read together with section 8(3) of the Sexual Offences Act. I think this sentence is warranted by the circumstances here given the fact that there was evidence on record that the Appellant had defiled the Complainant in the past. Therefore, the appeal against sentence is dismissed as well.

26. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

**a. For the reasons stated above, the appeal is dismissed and the conviction is hereby affirmed.**

**b. The sentence imposed by the Trial Court of imprisonment for twenty (20) years is hereby affirmed.**

27. Orders accordingly

**Dated at Nakuru this 8<sup>th</sup> day of November, 2019**

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**JOEL NGUGI**

**JUDGE**

**Delivered at Nakuru this 11<sup>th</sup> day of November. 2019**

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**J. N. MULWA**

**JUDGE**