



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
(CORAM: CHERERE-J)
CRIMINAL APPEAL NO. 103 OF 2018
BETWEEN
ISMAEL KOECH RONO.....APPELLANT
AND
REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Tamu SO NO. 21 OF 2018 by Hon. P.K. Rugut (SRM) on 29th October, 2018)

JUDGMENT

Background

1. The Appellant herein **ISMAEL KOECH RONO** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (*the Act*). The offence was allegedly committed against HA a girl aged 14 years on 27th May, 2018.
2. The prosecution called 7 witnesses in support of the charges. **PW1** the complainant herein stated she was aged 14 years and was in class 7 at [Particulars Withheld] Primary School. She recalled that on 27.05.18 a man she had never seen before chased her on the way to Girimori trading centre but did not catch up with her. It was her evidence that on her way back, she found the same man at some river and he held her and dipped her in water soaking her whole body, defiled her and then dragged her in a nearby bush and again defiled her after which he dumped her in the river from where she was rescued by a lady that was passing by who took her home. The Complainant identified the Appellant as the man that defiled her and stated that she was treated at Muhoroni Hospital as an inpatient for 2 days.
3. **PW2 LOA**, the complainant's mother stated that on 27th May, 2018 at about 01.00 pm, complainant returned home crying and with her clothes dripping wet and reported that she had been defiled by a man she did not know but who she could identify. She and her husband **PW3 Contract Keya Oguna** escorted the complainant to Muhoroni Hospital where she was treated as an inpatient for 2 days and later reported the matter to police.
4. **PW4 Jared Okoth Olala**, a clinical officer examined complainant on 29.05.18 and found she had bruises and inflammation on the labia majora and minora, bleeding from vaginal orifice, tear on the vaginal wall and hymen was broken. He produced complainant's P3 form, treatment notes and discharge

summary as **PEXH. 1(a), (b) and (c)** respectively. He concluded that there was evidence of penetration.

5. **PW5 Wilson Kiprono Chumba**, the Appellant's father led the chief and police to Kapsoit where Appellant was arrested. **PW6 Ann Ouma Silembe** stated on 29.05.18 at about 02.00 pm, she was fetching firewood near a river when she heard a child crying and upon checking saw a man that he had never seen before defiling the complainant. It was her evidence that the man ran away upon seeing her. He identified the man as the Appellant herein.

6. **PW7 PC Isaac Omondi**, the investigating officer stated that complainant stated that she was defiled by someone with a cut ear who was tall and of light complexion and on that basis arrested the Appellant and charged and had him identified by the complainant after which he was charged.

7. In his unsworn defence, the Appellant denied the offence and stated that he was framed.

8 *In a judgment dated 29th October, 2018, the Appellant was convicted and sentenced to 20 years' imprisonment.*

Appeal

9. *Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal on 08.11.18. From the 5 grounds of Appeal and submissions, I have deduced the following issues for determination: -*

1. Identification was not credible

2. That the defence was not given due consideration

10. *When the appeal came up for hearing on 24.07.19, Appellant stated that he was wholly relying on the grounds of appeal and written submissions filed on 03.10.19. The state through Ms. Gathu, Senior Prosecution Counsel opposed the appeal and relied on written submission filed on 03.10.19.*

Analysis and Determination

11. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that:

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

12. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under *the Act*. These are the age of the victim, penetration and identity of the offender.

13. In the case of **Alfayo Gombe Okello v Republic [2010] eKLR**, the Court of Appeal stated that:

In its wisdom, Parliament chose to categorise the gravity of that offence (defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1).

14. It is therefore important for the prosecution to prove the age of a victim since age determines the sentence to be meted out on the offender. In this case, the complainant's age was assessed to be 14 years.

Penetration

15. Section 2 of *the Act* defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”

16. The bruises and inflammation on the labia majora and minora, bleeding from vaginal orifice, tear on the vaginal wall and broken hymen proved without a doubt that there was evidence of penetration.

Identity of the offender

17. The trial court ruled that the incident happened in broad day light and that the complainant had had adequate time with the Appellant and ruled that he had been properly identified. The court also found that PW6 had stated that she had seen the Appellant defile the complainant. That far, the trial court correctly analysed the evidence on record.

18. It is worthy to note that the Appellant was a stranger to both the complainant and PW6. Whereas **PW7 PC Isaac Omondi**, the investigating officer stated that he arrested the Appellant because he fitted the description of a tall man with light complexion and a cut ear, neither the complainant nor PW6 that are alleged to have given these descriptions to PW7 gave any description of the assailant in their testimonies thereby creating a doubt as to how the Appellant was identified as the assailant.

19. In the case of **R v Turnbull, (1976) 3 All ER 551** Lord Widgery CJ observed as follows on identification: -

“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”.

20. If indeed the investigating officer had received the description of the assailant, I would have expected that an identification parade would have been conducted to rule out the possibility of mistaking the Appellant for another person. The trial court record shows that the trial magistrate did not make a finding as to whether the Appellant fitted the description of a tall man with light complexion and a cut ear. And even if he did which was not proved, there is no evidence that the Appellate is the only person that fits that description.

21. I have also considered whether dock identification of the Appellant by complainant and PW6 suffices. In the case of **GABRIEL KAMAU NJOROGE VS. REPUBLIC (1982 -88) 1 KAR PAGE 1134**, the Court of Appeal held as follows:

“Dock identification is worthless the court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade.”

22. Whereas there is evidence that complainant who was aged 14 years was defiled, the identification of the Appellant as the was not *“absolutely watertight”* to justify conviction and he ought to have been given the benefit of doubt. (See **Kiarie v Republic [1984] KLR 739**).

23. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty.

DELIVERED AND SIGNED IN KISUMU THIS 21st DAY OF November 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi

Appellant - Present in person

For the State - Ms. Gathu