



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
HCCRA NO 20 OF 2013

DANIEL KIVINDYO KIMULI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from original conviction and sentence in Criminal Case NO. 2 of 2010 in the Chief Magistrate's Court at Machakos delivered on 27th February 2010 by Hon. M.K. Mwangi (Ag. SPM)]

JUDGMENT

1. The appellant was convicted and sentenced to imprisonment for 20 years for the offence of defilement contrary to section 8(3) of the sexual Offences Act No. 3 of 2006 whose particulars were that “on the 10th day of January 2010 at [particulars withheld] village in Mwala District within Eastern Province intentionally and unlawfully caused his penis to penetrate the vagina of N.K. a girl aged 15 years.”

2. In his MEMORANDUM OF GROUNDS OF APPEAL, the appellant raised the following grounds of appeal:

1. That the learned trial Magistrate erred in law and in facts in believing the advanced recognition evidence which was not rested on implicating first report as is provided under section 137 (d) of the C.P.C
2. That the learned trial Magistrate misdirected in law and facts to rely on evidence of PW6 which was wholly impeached within the meaning of sec. 163 (1) (c) of Evidence Act.
3. That the learned trial Magistrate erred in law and in fact by not appreciating that there was absolutely no medical evidence linking me with the offence as charged herein.
4. That there was prejudice on defendant's rejection of my defence in which the grudge aspect was never considered as is required under section 169(1) of the C.P.C; thus an error in law and facts occasioned.

3. At the hearing the appellant and the DPP filed Written Submissions and made supplementary oral argument highlighting the written submissions. The appellant urged his grounds as follows:

Ground one and two -

It was alleged that i defiled her upon their return journey from a local market where PW1 had sent her with PW4 a younger brother for food stuffs. Time given was allegedly at around noon on 10th

January 2010. PW4 never witnessed the alleged defilement act against PW3 by the appellant. Two both witnesses contradicted the allegation of a knife in existence during or before alleged offence. Thirdly the version of PW1's allegation cannot be true because she was with PW4 who was leading. Fourthly the naming allegations that PW1 stated to have been given names of Daniel Kivinyo who purportedly grabbed and defiled PW3, remained untrue because the victim never knew my full names. The investigations in this case never revealed how many Kivindyo's existed within the locality of alleged criminal enterprise and of significant without the arresting officers evidence stating that I was arrested based on which names of the defiler in question.

There was no evidence advanced about what exactly lead to my arrest apart from what PW6 the investigating officer stated. He did not state who brought me to the station and how it was established that I was involved in the alleged offense since no police officer received my names from the complainant as the alleged defile in this case.

No ID parade was conducted upon my arrest. Section 137 (d) of the C.P.C fully implies here further echoed in the decided case ***Ann Wanjohi Njagi v Republic CR. Appeal No 133 of 1985*** in which Apaloo Platt and Masine J.J held; *“recognition must be borne out by any immediate report or an identification parade.”*

In ***Simiyu and another v. Republic (2005) 1 KLR pg. 103*** it was held that, *“in every case in which there is a question as to the identity of the accused the fact of their having been a description are matters of the highest importance of which evidence ought always to be given first of all by the person who gave the description and purports to identify the accused and then by the person or persons to whom the description was given”*

In relation to arresting officers evidenced the case of ***John Wachira Wandia V Republic CA: 57/2004 NYR Ur*** whereby P.K TUNOI, E.O' OKUBASU AND E.M GITHINJI JJ.A. held that quality of the evidence against the first appellant was poor. The investigating officer who arrested the first appellant did not testify at the trial. It is not therefore proved that the 1st appellant was arrested in connection with the offense charges.

Ground Three and Four

There was no medical evidence advanced by the prosecution to link me with the alleged penetration of PW3 in order to justify conviction over me. It is submitted since the complainant was treated on the material day of incident then upon my arrest it would have been reasonable for the police to involve my being escorted to hospital for examination aimed to match with the findings earlier recorded when PW3 received treatment.

The judgment did not contain the point (s) for determination therefore Section 169(1) of the C.P.C was violated.

Respondent's Submissions

4. The State opposed the appeal under the following heads of grounds:

- a) Beyond reasonable doubt
- b) Defence not considered
- c) Medical evidence

1. Whether the prosecution proved its case beyond reasonable doubt

In company of PW2, the complainant reported the matter to the police station then proceeded to hospital where PW1 was examined and treated. PW3 corroborated pw1 evidence. PW2 in the

company of PW4 confirmed that they met PW1 who told them the appellant had defiled her. This was well corroborated by the medical evidence of PW5 that upon examination PW1 had swelling on both majora and minora, enter was swollen and her hymen was perforated. there were dried blood stains on her minora, and that there was whitish dry substance on her thighs thus concluding that she had been defiled. Pw6 carried out the age assessment and confirmed that she was 15 years.

2. Whether the appellant defense was considered during trial

The appellant opted to give unsworn evidence which was mere denials. The court considered the appellant defense but dismissed it since it did not raise any doubt on the evidence by the prosecution.

3. Whether there is sufficient medical evidence that linked the appellant to the offense.

Pw1 was taken to the hospital after she was defiled and examined by PW5 who testified to the effect that on examination her hymen was perforated, there were dried stains on minora and there was whitish substance on her thighs. The medical examination on the appellant was not necessary and in any event the prosecution proved that there was sufficient medical evidence to support the evidence of PW1. In the case of **Kassim Ali v Republic** Mombasa Cr. App No. 84 of 2005 (2006) eKLR the Court of Appeal stated, “*the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence.*”

The Evidence

5. As a first appellate court the court is under a duty to re-examine the evidence before the trial court and draw its own conclusions before considering whether the findings of the trial court may be upheld. See **Okeno v. R** (1972) EA 32. The evidence before the court was as follows:

PROSECUTION’S CASE

1. A K K (PW1)

“I live in [particulars withheld] village Unia Location Mwala District, I am a farmer. PW1 is my daughter. She is aged 15 years. On 10.01.10 at about midday I sent my daughter (PW1) and W K to go to Kivaani Village. On their way back they met Kivindyo who grabbed N (3) and defiled her. Her brother W (PW4) run home and informed me, I run back and another and found that accused had defiled complainant. I questioned accused but he pelted us with stones I took PW1 to hospital and made report to police. Complainant was taken to Mwala and Machakos hospital for age assessment and a report made dated 29.01.10. accused seized PW3 in a thicket on a footpath, I went with neighbors and raised alarm and found rice and flour strewn all over the path; complainant emerged from a thicket crying, she said that accused had grabbed her and had sexual intercourse with her. Complainant does not live far from our home; I went to the home of accused with T M. I examined complainant and found that she had cuts on the vagina and her clothes soiled and wet. I took her to Mwala Hospital where she was examined and treated. I was issued given p3 form and the same was filled by a doctor. Accused was arrested in Kivaani where he was found.”

Cross-examination by accused

“I know you; you are a bad person for sexually assaulting complainant. I came to the scene after the attack, PW3 knows you as neighbor. I found you in your home; I have no ill will against you. Complainant is in school, is not married neither does she have any children. Today she is 18 years old. I made report to the police.”

2. T M K (PW2)

“I live in Nairobi. I am a businessman I sell vegetables. On 10.01.10 I was at home in Mango Division in Mwala District when I heard W (PW3) screaming and saying that N his sister had been kidnapped. I ran towards where W was and we ran with PW1 towards where the attack was and we met PW1 emerging from the thicket crying. PW3 said she knew who defiled her; she led us to the accused’s home and pointed him to us. Accused denied and PW1 took PW3 to hospital. I knew accused even before.”

Cross-examination by the accused

“I knew you from date you were young. W is the one who raised alarm. Your house is less than a kilometer from mine; I am the immediate neighbor of PW1. Complainant was taken to hospital by PW1. I did not visit the exact spot where you defiled her. I don’t know if you have a grudge with PW1. I did not see accused defiling PW1. We did not meet accused at the scene.”

3. NK (PW3)

“I am 17 years old; I live in [particulars withheld] Village Kamwala Sub-location in Mwala District. I am in [particulars withheld] Primary School in class 7. PW1 is my mother. On 10.01.10 I was sent by my mother with my younger brother to the market. On our way we met accused on a thicket herding cattle, accused emerged from the side of the road grabbed me by my shoulders and put a knife on my neck. Then he pelted W with stones so that he could go away. He ran away I tried to scream but accused told me he would kill me. He took me inside the thicket. On arrival inside, he removed my small skirt and pant and he removed his trousers and pants. He put his pant inside his trousers’ pocket. He took the knife and ordered me to open my legs. Then he inserted his penis into my vagina and started having sex with me. At that time he was having knife in one hand. He finished and then he took my clothes hit me with the clothes and run away told me to go and not to look back. Then Accused left and run away. When I left to go home I met my mother and Rueben and we proceeded to home of the accused but he pelted us with stones. I knew the accused and it is me who showed my mother the assailant. I did not know accused’s second name except Kivindyo. His house is near our house. The police men come and accused run away. I and my mother went and made a report to the police and we were referred to hospital. I was treated at Mwala Hospital later I went for age assessment at Machakos General Hospital. When accused was arrested I was not present.”

Cross- examination by accused

“I know you for long. You defiled me on 10.01.10 in a thicket I don’t know why, you had never done anything bad to me before. I had no bad blood between our family and your family. That very day I went to hospital. First, I went home to follow you. From thicket you defiled me ... You grabbed me by both hands and wrestled me to the ground when I screamed you removed knife from your wrist band and ordered me to shut up. You pointed your finger at me when we were going to the market. The next day we went to Kivaani. I was treated and found to have been defiled. On our way to Kivaani Police station I saw you with your father you alleged to be going to Kangundo. You compromised police at Mwala, you put knife on breast pocket and grabbed a stone and pelted me.”

Re-examination

“There was no bad blood between my family and family of accused.”

4. WK (PW4) on oath upon voire dire examination

“I am 13 years old my mother is K K (PW1). On 10.01.10 at about 12 noon I and my sister were going home from the market when we met accused. He grabbed the complainant who is my sister and dragged her to the thicket. I confronted the accused but he pointed a knife I got scared and run away and told my mother, and I, my mother and another went to the scene but complainant on the way crying and followed accused to his house. On seeing us, accused pelted us with stones. I

used to see the accused in Jeshi market. I had known the accused for long.”

Cross-examination by accused

“I know your home. You chased me when you grabbed complainant You live in the neighbourhood. It is not very far from our home to yours.”

5. Joseph Ndolo (PW5)

“I am a Clinical Officer at Mwala District Hospital. On 10.01.10 about 6.30 pm a patient by the name NK presented herself before me she complained of having been defiled by a known person. Complainant had a dirty skirt and torn short trousers; she appeared sober and scared. On examination, complainant had tenderness on upper chest, swollen right wrist joint. Lower limbs had tenderness, on hip joint and walking with tenderness. On Examination of genitalia there was swelling of labia majora and minora and oedema cervic. Hymen had been perforated and dried blood stains on entry to vulva and whitish substance on her hips. I put her on post exposure treatments to prevent HIV and antibiotics and referred her for counseling. I completed P3 from on 15.01.10. Later re-examined her at the time of filling the p3 and was walking with a gait.”

Cross-examination by accused

“Treatment card confirms that complainant was walking with support. Complainant was injured. PW3 said she knew the assailant who threatened her with a knife. I was not at the scene of the crime; if you were presented to hospital we would have examined you.”

6. No. 36960 CPL Sylvester Khasira (PW6)

“I am attached to Masii Police Station Crime Branch. On 13.01.10 at about 2.30 pm a man come to our office claiming that her daughter had been defiled. I completed a P3 and sent her to hospital. On 15.01.10 P3 was returned by complainant and I then recorded statements. On 21.01,10 accused was brought to the station and on 22.01.10 I charged the accused. The complainant was 15 years of age.”

Cross-examination by accused

“I saw complainant on 13.01.10. Police officers visited the scene. P3 confirms that you defiled her. You were arrested about ten days after the attack as you had fled; efforts to trace you had failed. I was not present when complainant testified. Complainant knew you very well. There is no grudge between you and complainant’s family.”

DEFENCE CASE

6. When put on his defence, the appellant accused person gave an unsworn statement as follows:

Daniel Kivindyo Kimilu (DW1)

*“I live in Kivaani Location, I am a mechanic. On 21.01.10 I woke up as usual from my parents’ house. I went to work and arrived at 8.30 am. When I saw persons I knew they told me I am required by the area Chief. I finished work and went to the Chief. The Chief come out with handcuffs then out me in cells up to 22.01.10. I was told I stole at my work place, I was taken to Masii Police Station, put in cells and about 12 am my finger prints were taken and I was beaten and threatened and on 23.01.10 I was arraigned in court, charged with something I never did. **To date I deny, I don’t know the complainant and I have never met her. PW2 alleged that he saw the person but he did not know me. PW3 and PW4 did not confirm who did it. PW5 did not examine me, PW6 the investigating officer did not establish who did it. I was framed up. My parents and parents of the complainant are enemies.”***

In convicting the appellant, the trial court its JUDGMENT held substantively as follows:

*“The defence adduced by the accused person does not poke any holes into the prosecution’s case. **The evidence led by the prosecution is firm and well corroborated. The medical evidence confirms clearly that there was penetration and so does the evidence of PW3. The evidence of PW3 and PW4 confirm that the penetration was done by the accused.** The prosecution has proved its case to the required standards on the main count and do hereby find the accused guilty as charged in the main count.”*

Issues for Determination

7. The issues for determination by the court are simply whether the offence of defilement was committed on the complainant as charged and whether the appellant accused person was the perpetrator.

Determination

Whether the act of defilement defined under section 8(1) as read with 8(3) of the Sexual Offences Act was committed

8. The age assessment form filled by Dr. P. Litunya marked MFI-3 confirmed PW3 at about 15 years of age as charged. There was evidence of the complainant and her brother, PW3 and PW4, of her attack on their way back home from the market when someone jumped from the side of the road and grabbed PW3, and threatening to kill her with a knife took her into a thicket and had sexual intercourse. The eye-witness account of the complainant is proof of defilement as follows:

*“On 10.01.10 I was sent by my mother with my younger brother to the market. On our way we met accused on a thicket herding cattle, accused emerged from the side of the road grabbed me by my shoulders and put a knife on my neck. Then he pelted W with stones so that he could go away. He ran away I tried to scream but accused told me he would kill me. He took me inside the thicket. On arrival inside, **he removed my small skirt and pant and he removed his trousers and pants. He put his pant inside his trousers’ pocket. He took the knife and ordered me to open my legs. Then he inserted his penis into my vagina and started having sex with me.** At that time he was having knife in one hand. He finished and then he took my clothes hit me with the clothes and run away told me to go and not to look back. Then Accused left and run away.”*

9. This evidence is corroborated by PW4, the complainant’s brother who witnessed the complainant being grabbed and pulled into the thicket while he was threatened with a knife and pelted him with stones so that he ran away.

10. The fact of defilement is further corroborated by the Clinical Officer PW5 who examined and treated complainant PW3, when he testified that he had examined her and confirmed penetration as follows:

“On 10.01.10 about 6.30 pm a patient by the name N.K presented herself before me she complained of having been defiled by a known person. On Examination of genitalia there was swelling of labia majora and minora and oedema of cervix. Hymen had been perforated and dried blood stains on entry to vulva and whitish substance on her hips.”

11. I respectfully agree with the Court of Appeal decision in ***Kassim Ali v Republic*** Mombasa Cr. App No 84 of 2005, (2006) eKLR that lack of medical evidence is not fatal to proof of rape [or defilement] and that the same may be proved by the evidence of the complainant or circumstantial evidence. Indeed, section 124 of the Evidence Act does away with the requirement of corroboration in sexual offences cases where the court for reasons to be recorded believes the complainant to be telling the truth. In this case, however, I find that the complainant’s evidence of defilement is corroborated by the evidence of her brother PW4 and the clinical officer, PW5.

Defilement of a girl aged 15 years had been proved.

Whether appellant committed the offence charged

12. As to whether the appellant is the person who committed the said act, the accused person was recognized by both the complainant and her brother, PW3 and PW4, both who knew the accused for a long time as a neighbor, and as held in *Anjononi and Others v Republic* (1976-1980) eKLR “*the recognition of an assailant is more satisfactory more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.*” It was the complainant, a standard seven pupil aged 15 at the time, who took the mother and PW2 to the appellant’s house immediately after the assault. Happening so close to the incident the identification of the appellant as the attacker to the mother and PW2 is by leading them to his home free from error. It matters not that the complainant only knew the appellant as a neighbour and by one name ‘Kivindyo’ which is common in Kamba, according to the appellant. The complainant was certain of the Kivindyo who had defiled her and that is why she led the mother and PW2 to the appellant’s, and not any other Kivindyo’s, home. It being evidence of recognition, there was no question of holding an identification parade.

13. In addition, PW2 who also knew the appellant as a neighbour confirmed having been led by the complainant to the appellant’s home when they, together with the complainant’s mother PW1, went to respond to the calls for help by the complainant’s brother.

14. Moreover, the report by the complainant to the mother and the neighbor PW2, when they came to her rescue, that the appellant was the attacker must be taken as a first report within the meaning of section 165 of the Evidence Act giving consistency and therefore credibility to the complainant’s identification evidence. Section 165 of the Evidence Act provides as follows:

“165. Proof of consistency by former statements

In order to show that the testimony of a witness is consistent any former statement made by such witness, whether written or oral, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.”

15. In his unsworn statement, the appellant denied the allegations by the prosecution witnesses and without giving any particulars alleged the charge to be trumped up because of a grudge between his parents and the parents of the complainant. It is difficult to see how the alleged grudge whose nature is undisclosed could translate into inculpatory evidence so clearly given by the two minors – the complainant and her brother – who recognized the appellant as the perpetrator of the defilement, which was corroborated by the medical examination evidence of the clinical officer who examined the complainant after the attack.

16. The trial magistrate was right in finding the charge against the appellant for the offence of defilement contrary to section 8(1) as read with 8 (3) of the Sexual Offences Act proved beyond reasonable doubt.

17. The appeal is dismissed.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 12TH DAY OF JUNE 2018.

ODUNGA J.

JUDGE

Appearances:

Appellant in person.

Mr. Machogu for the Respondent.