



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**HCCRA NO. 154 OF 2014**

**BONIFACE MANYAA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*( from the original conviction and sentence by C. Kendagor, Ag. SRM*

*in Kakamega CM's S.O. No. 76 of 2016 dated 30/10/14)*

**J U D G M E N T**

1. The appellant herein was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 and sentenced to imprisonment for life. He was aggrieved by the conviction and the sentence and filed this appeal. The grounds of appeal as per the amended petition of appeal dated 3/10/16 are that:-

1. That the trial magistrate erred in law and in fact by not appreciating the evidence of the appellant.
2. That the evidence of the prosecution was contradictory and did not support the charge against the appellant.
3. That the charges against the appellant were defective in total.
4. That no known offence has been disclosed as having been committed by the appellant by the evidence disclosed by the prosecution witness.
5. That no loss or damages have been occasioned by the acts of the appellant.
6. The trial magistrate erred in law when she failed to record the questions that she put to the complainant during voir dire.
7. The trial magistrate erred in law in finding that there was corroboration of the evidence of the complainant.
8. The trial magistrate erred when she failed to set out her points for determination and the reasons in support of her judgment.
9. The trial magistrate's decision was arrived at in a cursory and /or perfunctory manner and therefore occasioned a miscarriage of justice.
10. The trial magistrate erred when she failed to find that the prosecution had proved the age of the complainant by relying on a document that had been procured after the complainant had reported the matter which amounted to evidence fishing.
11. The trial magistrate's decision was openly predetermined and indefensible

2. The appeal was opposed by the state.

3. The particulars of the charge against the appellant were that on the 3<sup>rd</sup> November, 2012 at around 1300 hours at Shirembela village, Eshisuru Sub – location, Butso Central location in Kakamega County he unlawfully and intentionally inserted his genital organ namely penis into the genital organ namely vagina of B.A (herein refer to as the complainant) a girl aged 10 years.

### **The prosecution case:-**

4. The evidence for the prosecution was that the complainant was living with her father, Pw1. Her father sells Sukuma wiki. That on the morning of the material day the appellant had gone to the home of complainant's father and bought Sukuma wiki. The complainant's father then left his home to attend a funeral at a neighbouring home. He left his children at home.

4. That while the complainant's parents were away, the appellant went to the complainant's home. He told the complainant (PW2) to accompany him to get the money for Sukuma wiki. The complainant accompanied him. On getting to a certain hill the appellant dragged her into a sugarcane plantation. He removed her underpants. He ordered her to lie on the ground. He removed his trouser. He defiled her for about 10 minutes. When he finished he told her to go home and said that he had given the money to her mother.

5. The complainant's father then returned home. He did not find the complainant at home. The complainant returned home while crying. A neighbour to the complainant Grace PW3 went to the home. She enquired from the girl why she was crying. She told her that the appellant had defiled her. She checked her private parts and found her bleeding from the private parts.

6. The complainant's father PW2 escorted the girl to Makunga Health Centre. She was examined. They were referred to Kakamega County Hospital. The matter was reported of Makunga Police Patrol Base. Cpl Rotich PW5 issued a P3 form to the girl. It was completed by a Clinical Officer PW4 at Kakamega County Hospital. The Clinical Officer found her with lacerations on the labia majora and the hymen torn.

7. PC Rotich investigated the case. The complainant's father gave him a dress and a pant that the girl was wearing on the material day. He was also given a letter from the school of the complainant. A birth certificate was obtained. On the 10/11/12, the appellant went to the police post and reported that he had been assaulted by the father to the complainant. PC Rotich arrested him and charged him with the offence. The appellant denied the charge. During the hearing the Clinical officer PW4 produced the P3 form and Post Rape Care Form as exhibits- PEX 3 and 4 respectively. He also produced the treatment notes from Makunga Health Centre as exhibit, PEX 2. PC Rotich produced the dress, the pant and letter from the complainant's school as exhibits, Ex 5-7 respectively. He also produced the birth certificate as exhibit, PEX 1.

### **Defence Case:**

8. When placed to his defence, the appellant gave sworn evidence. He stated that he was working as a casual at construction sites. That on the material day he was plastering a house of a certain person. He was not near the complainant's village on that day. He denied that he defiled the girl. In cross examination he denied that he had any debt owing to anybody at the home of the complainant. He further said that he has never been to the home of the complainant's father.

### **Submissions:**

9. The advocates for the appellant submitted that there were contradictions in the evidence for the prosecution. That it was alleged that after committing the offence, the appellant had gone into hiding. The investigating Officer however did not tell the court that the appellant had disappeared. The appellant was arrested while making a report of assault by PW1. The investigating officer did not say whether he investigated the allegations of assault on the appellant.

10. The advocates further submitted that the voire dire examination was not properly conducted. That the trial magistrate erred by failing to record both the questions put to the complainant and the answers given. That the failure to do so has denied this court the opportunity to make a finding on that aspect which is prejudicial to the appellant. Further that the language during the voire dire was also not recorded and therefore that it is not possible to tell what transpired during that process.

11. It was also submitted that the prosecution failed to properly, prove the age of the complainant. That the birth certificate produced by the prosecution was procured after the alleged offence took place. The document must have been processed with the sole intention of using it against the appellant.

12. Further that no age assessment was done on the complainant.

13. The prosecution counsel, Mr. Ngetich, on his part submitted that the charge against the appellant was proved beyond reasonable doubt. That there were no contradictions in the prosecution case and if they were there they did not affect the elements of the charge.

14. That the voire dire examination recorded the answers given by the minor. The magistrate recorded the reason for allowing the minor to testify on oath. The examination thereby passed the test.

15. He submitted that the birth certificate and the P3 form proved the age of the complainant. He urged the court to uphold the conviction and the sentence.

### **ANALYSIS AND DETERMINATION**

16. It was the evidence of the father to the complainant PW1 that the appellant had gone into hiding after committing the offence. That he later learnt that the appellant had returned home. He went with 4 men to arrest the appellant but on seeing them he ran away while screaming that he was being attacked. He went and report to the police. He, the father to the complainant was taken in but the police knew that the appellant was lying and was put into custody.

17. The incident of the alleged assault on the appellant occurred on the 10/11/12. The report of defilement was made to the police on 3/11/12. The report of defilement had then been made to the police a week before the alleged assault of 10/11/12. The incident of 10/11/12 therefore

cannot be the genesis of the charges against the appellant. If the father to the complainant assaulted the appellant on 10/11/12, that is a different matter. It had no effect on report that was already with the police.

18. The learned trial magistrate did not record the questions put to the minor ( PW2 ) before she decided that the minor would give sworn evidence . She only recorded the answers given by the minor. The question is whether the procedure adopted by the trial court was proper.

The purpose of voire dire examination is to test whether a child understands the nature and obligations of an oath. The child herein was examined and found to understand the nature of oath. She gave sworn evidence and she was cross-examined by the appellant.

19. The Court of Appeal in **Maripett Loonkomok Vs Republic** held that both the question and answer format and the answers only format are acceptable. Said the court:

**“ Today courts accept both the question and answer format and the recording of a child’s answer only (see James Mwangi Muriithi Vs Republic (Criminal Appeal No. 10 of 2014). What is constant is that, whatever format the court adopts it must be on record.....”**

In the premises the procedure adopted by the trial court was acceptable. The trial court found that the witness understood the meaning of oath and made a finding that she could give sworn evidence. From her evidence in chief and the answers given in cross examination, there was no doubt that the girl was intelligent enough and knew the duty of telling the truth. She was cross – examined by the appellant and insisted that the appellant defiled her. The trial court believed the evidence. I have no reason to differ with the findings of the trial court.

21. The father to the complainant stated in his evidence that the girl was at the time of the incident aged 10 years. The girl herself stated in court that she was aged 10 years. The estimated age in section “ C” of part 11 of the P3 form gave the estimated age of the girl as 10 years.

22. The age of a person can be proved by both documentary and oral evidence as was held by the Court of Appeal in **E dwin Nyambaso Onsongo Vs Republic(2016)eKLR(cited in the case of Mwolongo Chichoro Mwanyembe Vs Republic , Mombasa Criminal Appeal No. 24 of 2015) ( UR)** that :-

**“ ..the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.” “.. we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age , it has to be credible and reliable.”**

Though the birth certificate in this case was procured after the case was filed in court, the date of birth in the birth certificate corresponded with the evidence of the father to the complainant as to the age of the girl. The age in the birth certificates corresponded with the estimated age that was already recorded in the P3 form. I therefore find no misdirection on the part of the trial magistrate that the complainant was aged 10 years at the time that the offence was committed.

23. Though the amended petition of appeal stated that the charge was defective, the appellant did not point out any defect on the charged. I have checked the charge and I do not see any defect on it.

24. The complainant gave evidence that she knew the appellant before as a neighbour. That he used to visit their home to buy vegetables and changaa. That on the morning of the material day he went to their home at 8 am and her father plucked vegetables for him. He thereafter went back after her father had left. He tricked her to accompany her to collect the money for the vegetables and he ended up defiling her.

25. The father to the complainant told the court that he sells changaa and garden vegetables at his home. That on the morning of the material day the appellant had bought some vegetables from him.

26. The neighbour to the complainant PW3 testified that the girl told her that Bonny had removed her clothes and defiled her. She examined her and found that she was bleeding from the private parts. The witness said that Bonny is the appellant.

27. There was then no doubt that the complainant knew the appellant before. The father to the complainant corroborated the evidence of the complainant that on the morning of the material day the appellant had gone to their home to buy vegetables. The complainant told Grace PW3 that it is Bonny who had defiled her. In court the complainant was referring to the appellant as Boniface. The complainant thereby identified the appellant as the person who defiled her. There was no mistaken identity.

28. The Clinical Officer PW4 examined the complainant on the same day of the commission of the offence and found her with a torn hymen and lacerations on labia majora. The findings by the Clinical Officer clearly proved that the complainant had been defiled. The medical opinion of the Clinical officer corroborated the evidence of the complainant that she had been defiled.

29. The provision to section 124 of the Evidence Act allows the court to convict on the evidence of a child victim in a case involving a sexual offence if the court is satisfied that the victim of the offence is telling the truth. This was emphasized by the Court of Appeal in **Geoffrey Kioji Vs Republic, Nyeri Criminal Appeal No. 270 of 2010 (cited in Dennis Osoro Obiri Vs Republic (2014)eKLR)** where it held that:

**“Where available, medical evidence arising from examination of the accused and linking him to defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person**

*can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person ...under proviso to section 124 of the Evidence Act Cap 80 Laws, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim, if the court believes the victim and records the reasons for the belief.”*

30. In this case there was sufficient evidence to show that the victim was telling the truth. Her evidence as to who had defiled her was corroborated by her father PW1 and a neighbour PW3. The evidence of the witnesses was credible and reliable. That the case was framed up by the complainant’s father over an incident that occurred later after the date of the commission of the offence can only be a blatant lie.

31. The trial magistrate considered all the ingredients of a charge of defilement. I find that the conviction was in accordance with the law.

In the premises the appeal is bereft of merit. The conviction against the appellant is upheld and the sentence imposed on him is affirmed. The appeal is accordingly dismissed.

**Delivered, dated and signed at Kakamega in open court this 18<sup>th</sup> day of July,2018.**

**J.NJAGI**

**JUDGE**

In the presence of:

.....for appellant

.....for respondent/state

.....court assistant

Appellant.....present

14 days Right of Appeal explained.