



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL APPEAL 138 OF 2015**

**JOHN WAFULA MASINDE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(appeal arising from the original conviction and sentence by G.N. Sitati ,RM ,in Mumias PMC's Criminal Case No. 677 of 2014 dated 24<sup>th</sup> Nov, 2015)*

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

1. The appellant herein was convicted of the offence of defilement contrary to section 8(1) are read with section 8(4) of the Sexual Offences Act No.3 of 2006 and sentenced to serve 15 years imprisonment . He was aggrieved by the said conviction and sentence and filed this appeal. The grounds of appeal are in summary that the appellant was convicted on fabricated evidence, that there was no medical evidence to connect him with the offence and that there were no proper investigations conducted in the case.

2. The appeal was opposed by the state.

3. The particulars of the offence against the appellant were that on the 6<sup>th</sup> July 2014 at 7 pm in Mumias District in Kakamega county he intentionally caused his penis to penetrate the vagina of ( herein referred to as the complainant/girl) a child aged 15 years .

**The prosecution case :-**

4. The case for the prosecution was that at the material time the compliant was a primary school pupil at [Particulars Withheld] primary School in Mumias. That on the 6/7/14 she was selling boiled maize at Shibale market . That in the evening at 7 pm she wanted to board a motor cycle taxi to go home when the appellant who was unknown to her before ordered for two maize cobs from her. He then said that he did not have change. He asked her to accompany him to his place so that he could give her the money. They walked through some residential plots into the house of the appellant. On getting there he shut the door to the house. He held her and pulled her down to the floor. He pulled up her skirt and removed her panties. He removed his trouser and underwear. He inserted his penis into her vagina. She screamed. She was bleeding from her vagina. Two boys responded to her screams. They called the village elder. She and the appellant were taken to Mumias police post. The appellant was locked up. The complainant was taken to Matungu sub – district hospital but they did not get a doctor.

5. On the following day the complainant and the appellant were taken to Mumias Police station. Cpl Kanario PW3 of the said Police station issued a P3 form to both of them and took them to Matungu sub – county Hospital. They were examined and the P3 Forms completed by a clinical officer PW2. The clinical officer found that the complainant's hymen was torn with a reddish demarcation. The vulva was recently torn. There was whitish vaginal discharge and blood. A vaginal swab revealed epithelial cells but no spermatozoa. The clinical officer formed the opinion that the girl had been defiled. Cpl Kanario charged the appellant with the offence. He denied the charge. During the hearing clinical officer produced the treatment notes, the P3 form and laboratory results for complainant as exhibits. He also produced the treatment notes, the P3 form and laboratory results for the appellant as exhibits. Cpl Kanario produced a pink pant as exhibit. The complainant produced a letter from her school as exhibit. It indicated that she was in class 4.

6. When placed to his defence, the appellant gave sworn evidence and stated that he was arrested on 5.7.2014 after he was found near a place where illicit brew is sold. He was detained at Mumias police station until the 8<sup>th</sup> July 2014 when he was arraigned in court over offences that were strange to him. He said in cross examination that he lives at Angola and has never been at Shibale market.

**SUBMISSIONS**

7. The appellant made written submissions. He submitted that the age of the complainant was not proved either by oral documentary evidence. That his age was also not proved. That crucial witness who were said to have been at the scene and the police officers who are said have re-arrested him were not availed to testify in the case. Neither was the complainant's parents called to testify on the age of the complainant. He urged the court to find that the case was not proved beyond reasonable doubt.

8. The state did not make any submissions. The prosecution counsel Mr Ngetich relied on the decision of the lower court.

## **ANALYSIS AND DETERMINATION**

9. This is first appeal. It is the duty of a first appellate court to look at the evidence presented before the trial court afresh, reevaluate and re-examine the same and reach its own conclusions. The court must bear in mind that it did not have the opportunity to see the witnesses as they testified. The court should also look at the grounds of appeal put forward by the appellant – See **Kinyanjui Vs Republic** (2004) 2KLR 364.

10. The complainant told the lower court that she was aged 15 years and that she was at the time in class 5. The estimated age in part 11 ' C' of the P3 forms is indicated as 15 years.

11. The importance of proving the question of age in a case of defilement was emphasized by the court of Appeal in **Kaingu Elias Kasomo Vs Republic (2016) eKLR** where the court sitting at Malindi said that:

*“ Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim.”*

12. The age of a person can be proved by both documentary and oral evidence as was stated by the Court of Appeal in **Edwin Nyambaso Onsongo Vs Republic(2016)eKLR**(cited in the case of **Mwolongu 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.”*

13. In **Evans Wamalwa Simiyu Vs Republic** the Court of Appeal held that where actual age of a minor is not known proof of his/her apparent age is sufficient under the Sexual Offences Act. Said the Court:

*“ We have anxiously considered the purport of this evidence since the doctor does not appear to have carried out a scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act ' age ' where actual age is not known means apparent age . This means that in the doctor's view the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor was not established, the apparent age was established as 12 years.*

In the case before me, the complainant said that she was aged 15 years. The doctor estimated her age at 15 years. I would therefore hold that the complainant's age was proved to be 15 years.

14. The appellant submitted that there was no medical evidence to link him to the commission of the offence. However the position of the law is that defilement can be proved without medical evidence to link an accused person to the commission of the offence. In **Geoffrey Kioji Vs Republic, Nyeri Criminal Appeal No. 270 of 2010** (cited in **Dennis Osoro Obiri Vs Republic ( 2014)eKLR)** the Court of Appeal 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.”*

The court can therefore convict an accused person in a defilement case without medical evidence if the court is satisfied that the victim is telling the truth.

15. The appellant contends that he was convicted on fabricated evidence and that no proper investigations were conducted in the case.

16. The investigating officer PW3 testified that she escorted the complainant and the appellant to Matungu Sub County, Hospital on the 7/7/2014. The Clinical Officer PW2 stated in his evidence that he saw the complainant on 7/7/2014. His evidence was that the complainant was wearing a pink underpant when he saw her. The investigating officer however stated that she recovered the pink pant from the house of the appellant. That it was identified by the minor and she kept it as an exhibit.

17. The position of the law where there are inconsistencies, contradictions and discrepancies in the prosecution case is as was stated by the Court of Appeal in **Njuki & others Vs Republic (2002) 1KLR** that it is the obligation of the court to determine whether the discrepancies, contradictions and inconsistencies are of such a nature as would create doubt as to the guilt of the accused and where they do not they are curable under section 382 of the Criminal Procedure Code. The court can ignore minor contradictions unless it thinks that the contradictions points to deliberate untruthfulness or it affects the main substance of the charge – See **Jackson Mwanzia Musembi Vs Republic (2017) eKLR , C.O.A.**

18. In this case I do not think that the contradictions in the evidence of the Clinical Officer and the investigating officer were of such a magnitude as to create doubt in the guilt of the appellant. The contradiction did not go to the substance of the charge which was whether the appellant defiled the complainant or not. The contradiction was a minor one in relation to the evidence that was before the court. The court will therefore ignore the contradiction.

19. The appellant contended that the prosecution did not call witnesses to testify on when he was arrested. The appellant stated that he was arrested on the 5/7/14. The complainant stated that the appellant was arrested on the 6/7/14 upon which she and the appellant were taken to Mumias Police post and later taken to Mumias Police Station. There was sufficient evidence that the appellant was arrested on 6/7/15 in the company of the complainant. That he was arrested on 5/7/15 was a lie.

20. I have keenly gone through the evidence adduced before the lower court. It is my finding that the appellant was convicted on cogent and credible evidence. There was reliable evidence from the clinical officer that the complainant had been defiled. The complainant gave evidence that the appellant is the one who defiled her. She never knew the appellant before the date of defilement. It is not believable that the appellant was arrested over illicit brew and then charged with an offence of which he had no knowledge about. There was no evidence that the appellant was charged over the illicit brew. The trial court considered the appellant's defence and dismissed it. There was no reason to believe the defence in face of the overwhelming evidence that was adduced against the appellant.

In the foregoing, the appeal is bereft of merit and is accordingly dismissed.

Delivered, dated and signed at Kakamega in open court this 15<sup>th</sup> day of July,2018.

J.NJAGI

JUDGE

In the presence of:

Appellant .....

.....for respondent/state

.....court assistant.

14 days right of appeal explained.