



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 33 OF 2014

(Formerly Nakuru HC.CR.A. No. 76 of 2014)

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 2210 of 2012 of the Chief Magistrate's Court at Naivasha – S. Githinji, CM)

SAMUEL MUTIE MUNYAO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant, **Samuel Munyao** was tried for the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. In that on the 26th day of July 2012 at **[particulars withheld]** within Nyandarua County, he intentionally and unlawfully did cause his genital organ namely penis to penetrate vagina of E.N.C. a girl aged 12 years. He was found guilty, convicted for the offence and sentenced to 20 years imprisonment.

2. His four amended grounds of appeal are that:

“1. THAT, the Hon. trial magistrate erred in matters of law and fact by holding that the case against me was proved beyond reasonable doubt whereas there was no prove of penile penetration of the complainant’s genitalia owing to the fact that the medical examination report contained no expert opinion on the same and was improperly admitted under Section 33 of the Evidence Act.

2) THAT, the Hon. trial magistrate erred in matters of law and fact by not resolving the explicit evidence of grudges apparent in the evidence in favour of the defence case.

3) THAT, the Hon. trial magistrate erred in matters of law and fact by not appreciating that the circumstances prevailing at the time of the purported defilement did not support the prosecution accounts of events.

4) THAT, the Hon. trial magistrate erred in matters of law and fact by not resolving the apparent contradiction prevalent in the prosecution case in favour of the defendant.”(sic)

3. In support of his grounds, the Appellant filed written submissions. Dismissing the medical evidence on penetration, the Appellant states that not only was it irregularly admitted but also that it did not support penetration. Regarding the 2nd and 3rd grounds the Appellant complains that the trial court did not address itself to the personal differences between **PW1** and the Appellant and that the circumstances obtaining on the date of the offence did not admit the occurrence of the offence.

4. Finally, in urging the 4th ground the Appellant highlighted alleged contradiction on the question whether the school had a watchman and whether pupils had unlimited access to the dormitories. Additional grounds filed without the court’s leave introduce other grounds including the failure by the prosecution to prove the victim’s age, and the complaint that the Appellant’s alibi defence was unfairly dismissed. Lengthy submissions citing several local and foreign judicial precedents are attached thereto.

5. The additional grounds were apparently filed alongside the amended grounds other documents filed on 2nd October, 2017.

6. The DPP through Mr. Mutinda restated the prosecution case at the trial in opposing the appeal, and argued that the Appellant’s denial was displaced thereby. In Mr. Mutinda’s view, all the ingredients of the offence were proved. In his response, the Appellant stated that the P3 form was riddled with doubt as to source, accuracy and basis there being no treatment notes presented at the trial. Moreover the P3 form did

not date the injuries noted on the victim.

7. As always, the appellate court has a duty to review the trial evidence and draw its own conclusions. In **Pandya -Vs- Republic [1957] EA 336** the Court of Appeal for Eastern Africa laid down the applicable parameters:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

8. Through eight witnesses the prosecution presented the following case. **E.N.C. (PW2)**, aged 12 at the material time, was a student at **[particulars withheld]** a primary school in Kinangop. She was a standard 7 pupil. The school is a boarding facility. On the evening of 26th July, 2012 she reported to her class prefect **M.N. (PW5)** that she had pain around her naval region. Together with **PW5**, the witness approached the Appellant who at the time was school head teacher. The Appellant instructed **PW2** to see him later in his office. The child did as instructed. The Appellant purported to examine her abdomen and sent her away saying he needed to get a torch for better examination.

9. When he returned at about 8.30pm carrying a torch into class, **PW1** followed him to his office. After checking her a second time, the Appellant locked the door and removed his trousers while undressing **PW2**. He then squatted and placed the complainant on his thighs before penetrating her. **PW2** went back to class after this was over and asked a friend **D.W.K. (PW6)** to escort her to the dormitory. She was crying. But **PW6** declined as she had some work to do. **PW2** therefore went alone and washed up. Then returning to class, she reported to **PW6** that she had been defiled. **PW6** advised strongly that they report to a female teacher. Thus **PW6** and another girl knocked on the door of teacher who lived in the school, **P N K (PW1)** at about 9.00pm. They reported what **PW2** had confided in them.

10. **PW1** accompanied the girls to the dormitory where she met and questioned **PW2**, who confirmed the report. **PW1** reported to the school management and at 9.30pm went to the house of a fellow teacher **S W M (PW4)**. The two teachers escorted the complainant to the mission hospital at Kinangop. The complainant was examined and thereafter admitted for some days.

11. Meanwhile, the school manager had made a report at the local police station. On the same night, the Appellant was arrested. On 27th July, 2012 the complainant was escorted to the government hospital at Engineer where she was examined and later the P3 forms completed.

12. In his unsworn defence statement, the Appellant confirmed that during the material period he was head teacher at **[particulars withheld]** having worked there for about 2 ½ months. On the material day, he woke up late as he was suffering a bout of malaria. After working during morning hours, he left to seek treatment at a local centre called Ndunyu Njeru, returning to the school at 4.00pm. He went to bed and at 9.00pm gave out the dormitory keys to a prefect.

13. At 10.00pm the manager of the school called him to open the school gate. He was confronted by the manager in the company of police officers. They handcuffed and put him in the boot of the vehicle and drove to the District Hospital. There he learned that unknown to him, a school pupil had been admitted. He was eventually charged. He denied the offence.

14. There was no dispute that until the material date, the Appellant worked as a headteacher of **[particulars withheld]**, a boarding school, and that he was arrested therefrom at about 10.00pm on 26th July, 2012.

15. In his appeal the Appellant has raised a challenge concerning the age of **PW2** and whether penetration occurred. Regarding the former, **PW2** testified that she was born on 28th February, 2001, which meant that she was aged about 11 ½ years at the time of the offence. Equally, the P3 form indicates that the examining doctor assessed her age to be 12 years. She was after all in standard 7 at the time of the offence. The question of proof of age of a minor victim of sexual assault has been settled by the Court of Appeal.

16. In the case of **Mwalongo Chichoro Mwajembe -Vs- Republic, Msa Cr.App. No. 24 of 2015 (UR)**

“.....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 documentary 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. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa -Vs- Republic, Criminal Appeal No.19 of 2014 and Omar Uche -Vs- Republic, Criminal Appeal No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda, Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable...”

17. As to the proper place of the issue of age and proof thereof in a defilement case, the Court of Appeal stated in **Evans Wamalwa Simiyu -Vs- Republic [2016] eKLR** that:-

“[14] From the above quoted section 8(1), it is apparent that the offence of defilement is complete immediately there is an act that causes penetration and the victim of the act is a child. Section 2 of the Sexual Offences Act, defines an ‘act that causes

penetration' as 'an act contemplated under the Sexual offences Act'. The same section defines "penetration" to mean 'the partial or complete insertion of the genital organs of a person into the genital organs of another person.' As regards the definition of 'Child' Section 2 of the Sexual Offences Act, adopts the definition of 'Child' provided under the Children Act, that is 'any human being under the age of eighteen years.' Therefore in establishing the offence of defilement proof of age is only relevant to show that the victim is under eighteen years of age and therefore a child within the definition of the Children Act. Thus the offence of defilement is complete immediately there is an act that causes the partial or complete insertion of the genital organs of the perpetrator's genital organs into a child's genital organs regardless of the age of the child.

[15] The appellant argued that the failure by the prosecution to provide an age assessment report or a birth certificate resulted in the failure by the prosecution to prove its case beyond reasonable doubt. The issue of age was considered in the case of Kaingu Elias Kasomo V R, Malindi Criminal Appeal No. 504 of 2014, (Unreported) where this Court (differently constituted) stated that age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence. This pronouncement was clarified by this Court in Tumaini Maasai Mwanja V R, Msa Criminal Appeal No. 364 of 2010 (Unreported) and in Stephen Nguli Mulili V Republic 2014 eKLR that:

"Proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age."

[16] Thus in relation to the appellant's case proof of age was relevant at two levels. First, to establish that the complainant was under the age of 18 years and therefore a child; and secondly, to establish that the complainant was between the age of 12 and 15 years such as to bring the sentence of the appellant, if convicted, within the minimum provided under section 8(3) of the Sexual offences Act.

[17] In this regard the evidence before the trial court was that of the complainant who stated during her *voir dire* examination that she was 12 years old. Her evidence was corroborated by PW5 who examined the complainant and filled the P3 form, which was produced as an exhibit and which stated the complainant's age as 12 years. Although no age assessment report, nor a certificate of birth or baptism certificate was produced in proof of complainant's age, the fact that the trial court found it necessary to carry out a '*voir dire*' examination to determine whether the complainant understood the nature of an oath or was of sufficient intelligence to understand the importance of speaking the truth, is a clear indicator that the trial court formed the impression that the complainant was a child of tender years, and therefore the fact of her being under eighteen years of age was apparent. Indeed section 2 of the Children Act defines "age" as meaning apparent age in cases where actual age is not known. Thus we are satisfied that there was ample evidence before the trial court, to show that the complainant was under 18 years of age and we have no hesitation in finding that for the purpose of establishing the offence of defilement the complainant was established to be a child.

[18] As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific 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 Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus although the actual age of the minor complainant was not established, the apparent age was established as 12 years. This mean her actual less her or more and this was sufficient to bring the complainant within the age bracket of 12 – 15 years or the purposes of the penalty under section 8(3) of the Sexual Offences Act."

18 In this case, the complainant's age was proved through her own evidence and the P3 Form. (See also Bakari Ndoro -Vs- Republic [2016] eKLR). Similarly, PW2 gave a detailed account of the events of the evening of 26th July, 2012 culminating in her presence, alone with the Appellant in his office at 8.30pm. These preceding events are corroborated by the testimony of the class prefect PW5. It all started with PW2's complaint that she had a pain in her abdomen around the navel.

19. When PW2 and PW5 went to the Appellant, he promised to see PW2 later in his office. What occurred then is lucidly narrated by PW2. That the Appellant purported to examine her navel area at 6.30pm, and claimed that he would need a torch for better visibility, asking the minor to join him in the office later when he had a torch. He did subsequently appear in class carrying a torch, and PW2 subsequently followed him. Again he set about examining her, having locked the office door before undressing PW2, himself and defiling her.

20. There is evidence that PW2 returned to class and asked PW6 to escort her to the dormitory, crying at the time. PW2 stated that she went to wash up and later returned to class where PW6 prodded her to report the incident after she confided in her regarding the events that had transpired in the Appellant's office. The matter was, through PW6 and a girl called MW first reported to PW1 and later PW3. Pausing here, there are at least three pupils who confirmed that the Appellant was in the school between 6.30pm and 9.30pm.

21. PW5 stated during cross-examination that:

"On 26th July, 2012 I had supper at 6.00pm. We (with PW2) came to you at 6.30pm. Teacher P (PW1) was not near then (Apparently, she ordinarily handled sickness cases). I had seen you pass. We had remedial lessons from 7.00pm to 9.00pm. You were teaching us English before teacher S (PW4). You left to teach class 8 and to perform other duties."

22. The witness had in his evidence-in-chief narrated his conversation with the Appellant before remedial classes began. He stated that the

Appellant had promised to see **PW2** after remedial lessons which took place from 7.00pm to 9.00pm

23. **PW6** stated during her evidence that the reason she did not accompany **PW2** to the dormitory on her request was that she was doing some work given by the Appellant to the class. She stated during re-examination:-

“There was a teacher in class 7 that night. It was the Accused person.”

24. **PW1** and **PW3** took the complainant to hospital because she had confirmed that indeed what **PW5** had reported was correct; that the Appellant had defiled her. The first medical record concerning penetration was, contrary to the Appellant’s submissions produced by **Dr. Maingi Muchiri (PW8)** alongside the P3 form completed by **Dr. Kinyanjui**.

25. Evidently, while the complainant was first treated at a private mission hospital on the night of the offence, the investigating officer, **PC Kipkemboi (PW7)** did escort her to the Engineer District Hospital for examination on 27th July, 2012 and hence completion of P3 form in the said hospital.. During cross-examination **PW7** stated that he took the complainant from the mission hospital to the district hospital for examination. **PW8** identified the PRC and P3 forms which he said were completed at Engineer District Hospital.

26. Questioned on this aspect, **PW8** stated that it is possible for a patient admitted in one hospital to be taken for treatment in another hospital without necessarily being discharged. He also observed that the findings in the PRC and P3 forms were consistent. He produced both documents as exhibits. The Appellant has made heavy weather of the production terming it irregular. However, the trial record shows that prior to the production, the court asked whether he had an objection to the production of the forms by **PW8** as the author had travelled to Germany. The Appellant stated that he had no objection.

27. The Appellant’s submissions on this matter appear to ignore the provisions of Section 78 of the Evidence Act which states:-

“(1) In criminal proceedings a certificate in the form in the First Schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.

(2) The court may presume that the signature to any such certificate is genuine.

(3) When a certificate is received in evidence under this section the court may, if it thinks fit, summon and examine the person who gave it.”

28. It is not clear to me what the Appellant intends to communicate when he says that the medical reports are inconclusive regarding penetration. **Exhibit 2** the PRC completed at Engineer District Hospital on 27th July, 2012 contains very specific findings. Regarding observations made during examination the form states:-

“Vagina - inflamed vaginal carnal, mild bleeding from vaginal carnal.

Hymen - Torn hymen. Lacerated labia minor, cut on right labia minora.

Comments: There is evidence of sexual defilement” (sic)

Further the form indicates under circumstances surrounding the incident that

“There was vaginal penetration, no anal penetration.”

29. The complainant was examined again some six days later by Dr. Kinyanjui who in describing physical state and injuries to genitalia observed:-

“Normal female external genitalia. Inflamed and lacerated labia minor, torn hymen.....

There was blood coming from the vaginal canal.”

The doctor noted on the last page that he made reference to the record of clinical notes taken on 27th July, 2012, the PRC Form. (**Exhibit 2**)

30. Taken together these documents indicate clearly that the complainant’s injuries were recent and proximate to the offence date, and further, provide strong corroboration of the sexual assault. **PW2**’s evidence regarding the assault is also strongly corroborated by the circumstantial evidence of fellow pupils namely **PW5** and **PW6**, as well as the teachers **PW1** and **PW3**.

31. It is true that the Appellant in his defence denied being present in the school area where classes and administration block are located. However, he did not directly suggest this to any of these witnesses during cross-examination. What the Appellant did vigorously canvass with the school witnesses is the existence of soured relations with each of the witnesses, including the children, over what appeared to be trifles. The witnesses acquitted themselves well, denying any conspiracy to bring him down or remove him from the school.

32. At any rate, what explanation would there be for **PW2's** injuries? Were they also deliberately caused with a view to discrediting the Appellant? There is no evidence that beyond minor local trifles, expected in a large community such as a school, the school witnesses had any grudge as such against the Appellant, a fairly recent entrant in the school administration. As for the so called contradictions regarding the presence of a watchman at the school or access by students to the dormitory, nothing turns on these matters in my view.

33. The assault occurred in the head teacher's office which was separate from the classrooms and the staff room as **PW7** explained. Besides, it seems that the Appellant, in asking **PW2** to see him at his office after the remedial classes intended to ensure that he would execute his apparent intention to defile **PW2** under the guise of examining her. Why did he not refer the child for treatment by a medical professional? The Appellant had adequate opportunity in the circumstances described to commit the offence. And it mattered not whether he defiled the Appellant while in upright position or squatting; penetration did occur as described by the complainant.

34. The trial magistrate set out in detail and analysed with care the evidence before him, both by the prosecution and the Appellant. He believed the former and gave sound reasons.

35. At the same time, he analysed the defence of the Appellant and found it wanting. For my part, reviewing the entire record of evidence, I am of the view that the Appellant's defence was totally displaced by the prosecution evidence. Not only was the Appellant positively placed at the scene of the offence, but also evidence of penetration was watertight. His defence defies belief. The Appellant's conviction was based on solid and credible evidence and must be upheld. In the result, the appeal must fail and is accordingly dismissed.

Dated and signed at Kiambu, this 26th day of June, 2018.

C. MEOLI

JUDGE

Delivered and signed at Naivasha, this 13th day of July, 2018.

R. MWONGO

JUDGE

In the presence of:-

Mr. Koima for the DPP

Appellant – Samuel Mutie Munyao - Present

C/C – Quinter Ogutu