



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 321 OF 2009

DAVID WAHINYA NJOROGE..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable B. N. Kituyi Resident Magistrate, delivered on 17th November, 2009 in Nakuru Chief Magistrate's Court Criminal Case No. 111 of 2009)

JUDGMENT

1. The Appellant herein, David Wahinya Njoroge was charged before the Nakuru Chief Magistrate's Court with the principal offence of defilement contrary to section 8(1) as read together with section 8(4) of the Sexual Offences Act. It was alleged that on 14/05/2009, at Machine Area in Nakuru County, he unlawfully had carnal knowledge of GW aged 16 years.

2. In the alternative, it was alleged that the Appellant committed an indecent act with GW on the same day and in the same place by unlawfully and indecently touching her private parts namely breasts.

3. The Appellant pleaded not guilty and the case proceeded to full trial. The Prosecution called five witnesses. The Appellant gave an unsworn statement when put to his defence. The Learned Trial Magistrate returned a verdict of guilty upon consideration of the evidence. She then sentenced the Appellant to the minimum sentence under the applicable statute – imprisonment for fifteen years.

4. The Appellant is aggrieved by both the conviction and sentence and has appealed to this Court raising three grounds of appeal. They are, lifted verbatim from his Amended Petition of Appeal, as follows:

1. The trial magistrate erred in law and in fact by failing to appreciate that the medical evidence produced in evidence before the trial court did not support the charge.

2. The trial magistrate erred in law and fact by contravening the provisions of Section 8(1) of Sexual Offences Act 3 of 2006 on sentencing as the age of the complainant was not proved.

3. The trial magistrate erred in law and fact by appreciating a P3 which had not been authorized from a police station to stand as evidence before the trial court.

5. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See *Okeno v Republic* [1973] E.A. 32; *Pandya vs. R* (1957) EA 336, *Ruwala vs. R* (1957) EA 570.

6. In the Court below, the following evidence was adduced.

7. GW, the Complainant, testified first. She told the Court that on 14/05/2009, she had gone to the Appellant's house to fetch water. The Appellant is her uncle. She had initially gone with her younger sister. It was early in the afternoon. It started raining heavily and they were forced to get into the Appellant's house to escape the rain. When the rain stopped, the Appellant's wife went to check on the cows while the Appellant sent his own children to collect firewood. The Appellant also sent the Complainant's sister away.

8. The Complainant testified that at precisely the moment when she was left alone with the Appellant, he pounced on her, covered her mouth

with his hand and led her to his bedroom. While there, he removed her panties and proceeded to defile her (“do bad manners to her” were the words she used in testimony).

9. However, the Appellant’s wife found them in the act – as the Appellant was fondling the Complainant’s breasts – which, according to the Complainant, was after he had already defiled her. The Appellant’s wife, Z W, testified as PW2 and confirmed finding the Appellant fondling the Complainant’s breasts. Z testified that on chancing on this scene, the Complainant took off. She, however, followed her and inquired what was going on. That is when the Complainant told her that the Appellant had forcefully defiled her. Z took the action of taking the Complainant, and her sister to their home where they informed the Complainant’s father what had happened.

10. The Complainant’s father is Simon M M. He testified as PW3. He told the Court about the time Z and his daughter came home and told him about the defilement. He then went with his son to the Appellant’s home to ascertain what had happened. Efforts to resolve the issue at home failed and the matter was reported to Mwariki Police Station. They took the Appellant to the Police Station where he was received by PC Ernest Lumbasi. PC Lumbasi was the Investigating Officer in the case and testified as PW4. He explained about the first report and about issuing the P3 Form, completing his investigations and forming the opinion that the Appellant had committed the offence.

11. Dr. Samuel Onchere rounded off the Prosecution case. He testified on behalf of Dr. Kwea who was no longer available due to transfer. He was familiar with Dr. Kwea’s handwriting and produced the P3 Form Dr. Kwea had filled as evidence. The P3 Form indicated that Dr. Kwea had examined the Complainant on 15/05/2009. The doctor found bruised labia majora and minora and a broken hymen. He also found whitish discharge on the vagina. He concluded that the Complainant had been defiled.

12. Put on his defence, the Appellant said that he was at work the whole day that day at Stem Hotel and that the case was a frame-up by his wife’s relatives because he had quarreled with the wife.

13. The Learned Trial Magistrate found that the Prosecution had proved its case beyond reasonable doubt and convicted. She found the defence narrative unworthy of belief. She said:

I had the opportunity of observing all the Prosecution witnesses and their demeanour was convincing. I don’t (sic) see what they would gain by making up a story especially PW1. That as it may, I find the Accused’s version as completely baseless, and not convincing at all and in the same breath, I dismiss it.

14. The Appellant argued his appeal wholly through written submissions. Mr. Motende, the Prosecution Counsel, orally opposed the appeal and urged the Court to affirm the conviction and sentence. He argued that there was sufficient evidence to convict. On age, Mr. Motende argued that it was proved that complainant was 16 since it is in the P3 form. He posited that penetration was proved by the Complainant and the Doctor’s evidence and corroborated by the evidence of PW2 – the wife of the Appellant. Finally, Mr. Motende pointed out that there could have been no error in identification since the Appellant was well known to the Complainant and the incident occurred during the day.

15. The main charge which the Appellant faced is defilement. Sections 8(1) and 8(2) of the Sexual Offences Act provide that:

8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(2) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

16. Section 2 of the Act defines “penetration” as:

the partial or complete insertion of the genital organs of a person into the genital organs of another person.

17. It therefore follows that to successfully obtain a guilty verdict, the Prosecution was required to prove three elements:

- a. That the Complainant was a child – in this case between sixteen and eighteen years old;
- b. That there was penetration of the Complainant’s genital organs;
- c. That it was the Appellant who caused the penetration.

18. I have carefully evaluated and analyzed the evidence presented at the trial.

19. The Appellant spent a considerable length of his submissions protesting that the age of the Complainant was not adequately proved because the charge sheet talked of 16 years yet the father of the Complainant, PW3, testified that the Appellant was 17 years old. I do not think anything comes out of this complaint. Section 8(4) of the Sexual Offences Act reproduced above covers victims who are between sixteen and eighteen years old. Here, the Complainant testified that she was 16 while the P3 Form also indicated that she was 16. The father, though, testified that she was 17 years old. The difference between the two is insignificant and immaterial since both ages come within section 8(4) of the Sexual Offences Act. What is important is that it is not contested or contestable on the evidence that the Complainant was between sixteen and eighteen years old.

20. The Appellant complains that no birth certificate or age assessment report was produced to prove age. However, our case law has now established that the age of a Complainant for purposes of sexual offences can be established by any credible evidence. The Court of Appeal in *Mwalongo Chichoro Mwanjembe v Republic*, [2015] eKLR has recently stated this:

*...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 v R, Cr. Appeal No.19 of 2014** and **Omar Uche v R, Cr. App.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 v Uganda, Crim. 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...*

21. In the present case the Prosecution was required to prove beyond reasonable doubt that the Complainant was between sixteen and eighteen years old. The Prosecution clearly met this threshold.

22. Turning to the evidence of penetration, the Appellant has protested that the medical evidence did not support the charge. He argues so because, to his mind, penetration could not have been proved if there was no evidence of "masculine discharge" found by the examining doctor.

23. In this case, penetration was established in three mutually reinforcing pieces of evidence: the testimony of the Complainant as summarized above; the medical evidence summarized in the P3 Form; and the circumstantial evidence provided in the testimony of PW2, the Appellant's wife, who found the Appellant fondling the Complainant's breasts after the act. In the face of these pieces of evidence, the Appellant's complaints that no "masculine discharge" was found on the minor easily fails: defilement is proved through evidence – and here there was enough evidence to prove it. There is no requirement that spermatozoa be found in a minor for defilement to be proved. See **AML v Republic [2012] eKLR**.

24. The last ingredient the Prosecution was required to prove was the identity of the person who caused penetration. In this case, the straightforward testimony of the Complainant is reinforced by that of PW2, the Appellant's wife, who found the Appellant fondling the Complainant's breasts after the act. The incident happened during the daylight and there is no possibility of mistaken identity. Finally, the Appellant was well known to the Complainant being her uncle.

25. There is one last curious complaint by the Appellant: that the P3 Form should not have been admitted as evidence because "the officer in charge of Mwariki Police Station did not authorize the P3 to leave the station..." I am not sure what this odd complaint is getting at. However, evidence adduced at the trial clearly showed that the incident was reported at Mwariki Police Post and recorded in the Occurrence Book. PC Lumbasi was categorical that he issued the P3 Form to be filled at the hospital. It is duly signed by a representative of the Police Post. There is simply no legitimate reason to doubt its authenticity. In any event, this would have been a complaint to be raised in the first instance during trial.

26. **The upshot is that there is no reasonable doubt at all that the Appellant committed the offence and that the conviction was safe and free from error. It is hereby affirmed.**

27. **The Appellant received minimum prison sentence allowed under the statute. As such, no appeal can lie against the sentence.**

28. **The result is that the Appeal is dismissed as meritless in its entirety.**

29. Orders accordingly.

Delivered at Nakuru this 20th Day of September, 2018

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JOEL NGUGI

JUDGE