



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 222 OF 2016

ABRAHAM NJOROGHE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in the Criminal Case No. 53 of 2014 of the Senior Principal Magistrate's Court at Kimilili by C. Menya – Resident Magistrate)

JUDGMENT

1. Abraham Njoroge, the Appellant herein was tried and convicted by C. Menya, Resident Magistrate at Kimilili Courts on a charge of defilement of a child aged 15 years contrary to **section 8(1) as read with subsection (3) of the Sexual Offences Act No. 3 of 2006**.

2. The particulars as contained in the charge sheet were that between the night of 25th and 26th June, 2014 within Bungoma County, he unlawfully and intentionally caused his penis to penetrate the vagina of D.A a child aged 15 years. (Initials are substituted for her name to protect the identity of the minor).

3. In the alternative, the appellant had been charged with committing an indecent act with a child contrary to **section 11(1) of the Sexual Offences Act**.

4. At the conclusion of the trial, the Appellant was convicted and sentenced to 20 years imprisonment. Aggrieved by both the conviction and sentence, the Appellant filed an appeal premised upon seven grounds of appeal which I have compressed as hereunder:

(1) The prosecution did not call crucial witnesses in the matter.

(2) The ingredients of the charge were not established.

(3) The infection and missing hymen in the complainant was sufficient proof of the Appellant's innocence.

(4) The court casually dismissed the Appellant's defence.

(5) The judgment went against the weight of the evidence.

5. As the court of first appeal, I am enjoined to re-evaluate the evidence on record afresh and draw my own conclusions in line with **Okeno vs. Republic [1972] E.A Pg. 32** while bearing in mind that I neither saw nor heard the witnesses give their testimony.

6. PW1 was 14 years old at the time of the incident. She gave sworn testimony and told the court that the Appellant was the bus driver in whose custody she was entrusted to travel in from Nairobi to Eldoret en route to Chemelil. The complainant's uncle, one D O, had escorted her to the bus stage in Nairobi and instructed the driver that upon arrival in Eldoret, he should transfer the Complainant to another vehicle which would take her to Chemelil.

7. It was the testimony of **PW1** that the accused bought her a soda and a snack and promised to help her find accommodation with his children. Instead, the Appellant escorted her to a lodging. It was here that the Appellant forcefully undressed her and inserted his male genitalia into her female genitalia. She testified that the Appellant defiled her twice that night.

8. The identification of the Appellant is not in doubt. **PW1** positively identified him as the bus driver of the Eldoret Express bus she boarded in Nairobi. **PW4**, a watchman at the Eldoret Express booking station in Kimilili, testified that the Appellant took the Complainant to buy her some food and he saw her return with a soda and bread. **PW5**, the Manager of the Eldoret Express Station at Kimilili did receive a report

from the Appellant and his conductor that there was a passenger who should have alighted in Eldoret but found herself in Kimilili.

9. Ms. Njeru learned counsel for the Respondent opposed the appeal and submitted that the ingredients of defilement had been proved. She urged the court to dismiss the appeal and uphold the conviction and sentence.

10. The Appellant submitted that the defilement charge was merely a scheme by his co-employer. That he merely bought the girl a soda and bread out of compassion. He urged that the requirements of age and penetration were not met and as such the case had not been proved against him beyond reasonable doubt.

11. Regarding the age requirement, the prosecution produced an age assessment report prepared by the Medical Superintendent at Kimilili District Hospital. According to the medical report, the child was approximated to be aged between 14 to 15 years. In **Criminal Appeal No. 42 of 2016, Jackson Mwanzia Musembi vs. Republic [2017] eKLR** the Court of Appeal (Kihara Kariuki, W. Karanja & Okwengu, JJ.A) while deliberating on the significance of establishing the age of a victim of defilement stated thus:

“Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the Sexual Offences Act.”

The Appellate court further applied the case of **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** where the Court of Appeal (Githinji, Koome & Okwengu, JJ.A) when faced with a similar situation, stated thus:

“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 Doctor’s 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.”

12. A look at Part C of the P3 form filed at Kimilili District Hospital indicates that the Complainant’s age was approximated as 15 years. The complainant told the court that she was aged 14 years. The fact that the trial court found it necessary to conduct a *voire dire* exam further indicates that the court formed the opinion that the Complainant was a child under the age of eighteen years.

13. The Appellant alleged that the issue of penetration which is an essential ingredient of the offence of defilement was not proved. He states that there were no blood stains on the sheets and further that the Complainant’s vaginal discharge was proof that he is not the one who defiled and infected her.

14. The P3 form indicated that the Complainant had normal external genitalia with no signs of trauma and the hymen was missing. She however had some vaginal discharge. **PW6** a medical officer of health at Kimilili Hospital testified that the examination of the victim was done within hours of the alleged defilement.

15. The Appellant submitted that the Complainant’s hymen was already missing and that he was not subjected to a medical exam. He however admitted to sleeping in the same hotel as the minor, even though he stated that it was not the one to which the Complainant pointed the police. Subjecting an accused person to a medical examination to prove or exonerate him from the offence is good practice and it is to be desired as it makes the work of the court easier. It is however not a mandatory requirement of the law as was held by the Court of Appeal (Maraga, Musinga & Murgor, JJ.A) in **Criminal Appeal No. 661 of 2010, Martin Nyongesa Wanyonyi vs. Republic [2015] eKLR**

16. In **Criminal Appeal 118 of 2013, Evans Wamalwa Simiyu vs. Republic [2016] eKLR** the Court of Appeal cited and applied the case of **AML vs. Republic 2012 eKLR (Mombasa)** in which the court stated thus:

“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

17. The Complainant herein identified the Appellant, a person she had spent a whole day with on the bus, as the person who sexually violated her. The various witnesses who were called attested to the fact that the Complainant had been in the company of the Appellant. This was also admitted by the Appellant who stated that he bought her some food and they slept in the same lodging on the night in question.

18. After careful analysis and re-evaluation of the evidence on record, I find that the Prosecution’s evidence against the Appellant was weighty and cogent. I also find that the weight of evidence against the Appellant has not been displaced by the defence. The Complainant was sexually assaulted as shown by the medical report, and there is no basis to find that she set out to fix the Appellant. The charge of defilement against the Appellant is therefore found to have been proved beyond reasonable doubt.

19. I therefore find that the appeal is unmeritorious and consequently dismiss it and uphold the decision arrived at by the trial court on both conviction and sentence. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF OCTOBER 2018.

L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 21ST DAY OF NOVEMBER 2018.

S. N. RIECHI

HIGH COURT JUDGE