



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO. 26 OF 2018**

**KEFA ONDIEKI SIBOTA.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Appeal against the conviction and sentence dated 13<sup>th</sup> day of December, 2012 in Criminal Case No. 1022 of 2011 at Ogembo Principal Magistrate's Courts before Hon. C.R.T. Ateya (R.M.)**

**JUDGMENT**

1. The appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2016. The particulars of the offence as per the charge sheet are that, "On 8<sup>th</sup> October, 2011 in Gucha District within Kisii County, the appellant intentionally and unlawfully committed an act which caused penetration of his penis to the vagina of RBI a child aged 5 years.
2. The trial court found the appellant guilty of the offence and sentenced him to life imprisonment. He now appeals against the conviction and sentence of the trial court. He filed his petition of appeal on 24<sup>th</sup> April, 2018 and later filed his amended supplementary grounds of appeal together with written submissions on 26<sup>th</sup> September, 2018.
3. It is the appellant's case that the trial court did not follow procedure as stipulated in the Criminal Procedure Code. He faulted the learned magistrate's decision on law for failing to take consideration of Section 198 and Section 200 of the Criminal Procedure Code; basing the conviction on bias in violation of the Constitution; and convicting the appellant on the evidence of Pw1 a child, whose evidence was merely manipulated and influenced by the prosecution through coaching to incriminate him.
4. The appellant further contends that the learned trial magistrate erred for failing to ascertain the age of the complainant; basing the conviction on the flawed testimony of the clinical officer PW 4 whose evidence was inconclusive and extremely incomprehensible; failing to call members of the public, administration police and the complainant's father to testify to the allegations made by the complainant; overlooking the appellant's defence without cogent reasons yet the same cast considerable doubts to the strength of the prosecution case; disregarding the appellant's defence that PW 2 retaliated because of a love affair that existed between the appellant and herself and because he refused to give her money.
5. At the hearing of this appeal, the appellant relied entirely on his written submissions. Mr.Otieno, counsel for the respondent opposed the appeal. He submitted that the case against the appellant had been proved beyond reasonable doubt and that his conviction was safe. Counsel also submitted that the appellant had been given a minimum sentence as per the evidence adduced in court.
6. As the first court of appeal I will reconsider and evaluate the facts as they emerged in the subordinate court and draw my own conclusions bearing in mind that I neither saw nor heard the witnesses, as is required in a first appeal ( **see Okeno vs R 1972 EA 32**).
7. Prior to giving her main testimony before the trial court, the complainant, RBI was taken through *voir dire* examination. The prosecutor then asked to stand her down when she kept mum observing that she might be comfortable to testify with her mother present in the court. PW2, the complainant's mother gave her sworn statement in Swahili. She stated that she had 5 children and the complainant was her 3<sup>rd</sup> born. She indicated that at that time of trial the complainant was 6 years old and attending school in baby class.
8. She recalled that on 8<sup>th</sup> October 2011 she was at home when her brother visited. She prepared a meal and after eating, she escorted her brother in the company of her husband at about 4:00 p.m. While escorting her brother she saw the appellant going towards her home. She had asked the complainant to go back home when she followed while she was escorting her brother. She testified that she left her husband on the road and arrived home earlier only to find the appellant in the act of committing the offence. He had placed the complainant besides the kitchen wall and he was inserting his penis into her private parts from behind. The complainant's pants were down. When she witnessed this she screamed. Her husband and other members of the public arrived and took the appellant to Kenyere administration police camp.

9. The complainant was taken to Ogembo District Hospital by her husband. She was admitted and discharged the following day. PW2 later reported the matter to Ogembo police station where they wrote statements and the complainant was issued with a P3 form. She identified the appellant as her husband's cousin.

10. When cross examined, she stated that her husband took the complainant to the hospital on the same day in the company of two administration police officers. Her husband did not write a statement as he did not witness the incident. She further stated that she had last seen her husband in January, 2012 and that he had not left her because she was the appellant's lover. She also refuted the claim that she was bitter because the appellant had sold a shamba and refused to give her money. She demonstrated how she found the complainant bending with her pants on the floor while holding the wall as the appellant inserted his penis from her back to her private parts.

11. The complainant testified in Kisii language with the court clerk interpreting. She stated the appellant's name and affirmed that he was well known to her. She testified that she was in the kitchen when the appellant came, removed her pants and did "tabiambaya" (bad manners) to her. Her mother caught him in the act. She testified that she was taken to hospital by her father where she was admitted and discharged the next day. On being cross examined, she confirmed that it was the appellant who had done "tabiambaya" to her.

12. PC Ndulu, (PW3) an officer attached to the Child Protection Unit in Ogembo Police Station testified that on 9<sup>th</sup> October 2011, she was at the police station when PW2 who was in the company of the complainant, RBI reported that the previous day, the appellant had been caught defiling the complainant. She recorded their statements and issued a P3 Form. She testified that the appellant had also been escorted to Gucha Level 5 hospital for examination. During cross examination, she stated that the complainant's father was not present when the incident took place and that since the complainant's mother was the one that found the appellant defiling the complainant, she was the one that wrote her statement.

13. Benjamin Okioma (Pw 4), a clinical officer at Kisii Level 5, stated that the complainant was 5 years of age at the time of examination at Gucha Level 4 where she gave a history of the defilement that took place on 8<sup>th</sup> October 2011 at around 4:00 p.m. The complainant had stated that a person who was well known to her was the one that came to her home and did bad manners to her. The examination showed that she had sustained injuries to her genitals. The appellant was also brought to the hospital for examination and all the laboratory examination results were negative. On cross examination, he stated that the weapon used on the complainant was the penis of a person well known to the victim.

14. After the close of the prosecution's case, the court found that the appellant had a case to answer and put him on his defence. The appellant testified that he had been summoned by PW2, whom he found sweeping. He stated that PW2 asked him for money and before he could answer started screaming. Two boys and some people who had been splitting wood came and beat him up. He averred that PW2 was his lover and that her husband had visited him in prison and told him that he had left PW2 for that reason. He claimed that when PW2 heard that he had sold his farm and not given him some of the money, she accused him of defiling her daughter.

15. The first issue that arises for determination is whether the trial court misapplied or disregarded the law during trial. An analysis of the record before the court shows that due procedure was followed. The appellant was arraigned in court within reasonable time; his plea was taken upon which he was granted bail. The court proceeded to conduct a *voir dire* examination of the complainant. This court finds that the trial court followed due procedure by asking the complainant her name, where she attended school, what church she attended and after observing that she was intelligent and understood the importance of telling the truth, it proceeded to take her main statement.

16. The appellant also faulted the trial court's decision for failure to take consideration of **Section 200** of the **Criminal Procedure Code**. Section 200 (3) provides;

“(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

17. The record is clear that the appellant was informed of this right by the succeeding magistrate on 23<sup>rd</sup> July 2012 upon which he opted to proceed from where the matter had reached. From the proceedings, it is also evident that the appellant did not raise any objection to the language used during trial. Similarly, his claim that the trial magistrate was biased and that he had been discriminated against was unsubstantiated. This court is of the view that the appellant received a satisfactory trial.

18. The second issue that emerges for determination is whether the respondent proved its case beyond reasonable doubt. The appellant was charged with defilement contrary to **Sections 8 (1) and (2)** of the Sexual Offences Act which provides;

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

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

19. The first ingredient that the prosecution ought to have proved was penetration of the child by the appellant. It was also necessary for the prosecution to prove that the complainant was aged 11 years or below for there to be a safe conviction under this section.

20. The testimony given by the complainant, PW2 and PW 4 all affirm that the appellant penetrated the complainant. RBI was familiar with the appellant; she recognized him, calling him by name and was not in doubt that he was the one that had done "tabiambaya" to her. PW2, the complainant's mother testified that the appellant was known to her as he was her husband's cousin. She described in action how she had caught the appellant in the very act of inserting his penis into the complainant's private parts from behind. PW4 corroborated this with medical evidence. He produced the P3 and Post Rape Care Forms which he had signed himself. He was also categorical in his testimony that

the complainant's vagina had undergone inflammation and her hymen was torn by the penis of a person known to the complainant.

21. The appellant also contended that the trial court had not ascertained the age of the complainant before convicting him. The principle in **Francis Omuroni –vs- Uganda Criminal Appeal No.2 of 2000** has been cited with approval in **Joseph Kieti Seet -vs- Republic [2014] eKlr, Criminal Appeal No. 91 Of 2011; Musyoki Mwakavi v Republic [2014] eKlr Criminal Appeal No. 172 Of 2012 and Nickline Odhiambo Otieno V Republic [2018] eKlr Criminal Appeal No. 55 Of 2017** when dealing with this issue. In that case the court held;

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.....”

22. In this case, the clinical officer, PW4, and the complainant's mother PW2 testified as to her age at the time of the commission of the crime as 5 years. Hence, the complainant's age was not in doubt.

23. On being put on his defence, the appellant gave unsworn evidence, the gist of which was that the complainant's mother, PW 2 had a vendetta against him. He stated that he had an affair with PW2 and that he had sold some land and declined to give her a share of the proceeds and this had led her to accuse him falsely of defilement. The trial court found the appellant's defence unconvincing and proceeded to convict the accused person in accordance with Section 8 (2) of the Sexual Offences Act and sentenced him to life imprisonment.

24. This court has analysed the evidence tendered by appellant before the trial court. He gave an unsworn statement in which he claimed that PW 2 had ill intentions in pursuing the charge against him. PW2 refuted the claims made by the appellant when they were raised during cross examination, this witness was consistent in her testimony and cross-examination. The evidence given by the prosecution confirmed that the appellant was guilty of the offence he had been charged with.

25. For the reasons given above, I find that the respondent proved its case beyond reasonable doubt. The Act stipulates a mandatory sentence of life imprisonment for the offence of defilement of a child below the age of 11. Accordingly, I uphold the conviction and sentence of the subordinate court and dismiss this appeal.

**Dated, signed and delivered at Kisii on this 15<sup>th</sup> day of November 2018.**

**R.E.OUGO**

**JUDGE**

In the presence of;

**Appellant In Person**

**Mr. Otieno for the State**

**Rael Court clerk**