



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 272 OF 2014

DOMINIC CHERUIYOT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Nakuru Children's Court Adult Criminal Case No. 19 of 2013 by Hon. M. A. Otindo R M on 03/01/14).

J U D G M E N T

1. **Dominic Cheruiyot** was arraigned before the Court following allegations of having defiled **MG** a girl aged **seventeen (17) years old** on diverse dates between **27th January, 2013** and **2nd February, 2013**. It was stated by PW1, **MG**, that the Appellant was her boyfriend, the relationship having mushroomed while she was in form one and at the time of his arrest she was in form three. On the night of **27th January, 2013** she slept at the Appellant's house where they engaged in coitus. She returned home at **4.00 a.m.** and was punished by her parents, an act that made her return to the home of the Appellant where she stayed for one week. As a result, he was arrested and subsequently charged.
2. When put on his defence the Appellant denied the charge. He stated that he was identified by a certain woman and arrested. While at the police station a certain girl was availed but he denied knowing her. It was alleged that he had married the girl but he did not know her.
3. The trial Court analyzed evidence adduced, found that the Prosecution proved all the ingredients of the charge beyond reasonable doubt against the Appellant and convicted him. He was sentenced to **fifteen (15) years imprisonment**.
4. Aggrieved, he appeals on grounds that no medical evidence connecting him with the offence was adduced; there was no evidence of age assessment; and the case was not proved beyond any reasonable doubt.
5. At the hearing the Appellant who acted in person, relied on his written submissions. He argued that on examination the Complainant had an old broken hymen and she could not tell when it happened. That the Doctor did not conclude that the defilement took place in the alleged act contrary to the sentiments of the trial Magistrate that the Doctor concluded that PW1 was defiled. That without any presence of bruises on the genitalia there was no proof of penetration as a hymen can be broken due to vigorous exercise. In this regard he cited the case of **Kibale vs. Uganda (1999) EA 148** where it was held that:

“.....that in order to prove the commission of the offence of defilement, it has to be established that there had been penetration of the sex organ of the victim by the sex organ of the assailant, and that the victim was below the age of eighteen years.”
6. That after the Appellant was implicated his age was **17 years 8 months** and the Court did not follow up the matter to have him taken for age assessment which was in violation of his rights. That in this regard his rights as provided by **Article 53(1)** of the **Constitution** were violated.
7. That the evidence of the Complainant required corroboration because she alluded to having been available for consensual sex therefore she must have had multiple sexual partners and therefore named the Appellant as a scapegoat.
8. The State through the learned Senior Assistant Director of Prosecutions, **Mr. Kemo** opposed the Appeal. He urged that medical evidence was adduced by the Clinical Officer. The Investigation Officer produced a Birth Certificate that proved the Complainant's age which was **17½ years**. The defence put up was considered by the trial Magistrate and dismissed. Therefore the conviction was safe and the sentence received was the minimum prescribed in law.
9. This being a first Appeal, I am duty bound to re-evaluate and reconsider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusions with that in mind (*see Okeno –vs- Republic [973] E.A. 32*).

10. Elements of the offence of **Defilement** are captured in **Section 8(1)** of the **Sexual Offences Act** which provides thus:

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

In the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** it was stated thus:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

11. To prove the age of the Complainant the Prosecution adduced in evidence a Birth Certificate **Serial No. [xxxx]**. The Complainant was born on the **22nd** day of **June, 1995**. As at **January, 2013** she was **17½ years old**. The **Children Act, Section 2**, defines a child as a human being under the age of eighteen years therefore the Complainant was a child.

12. The Complainant told the Court that she had consensual sexual intercourse with the Appellant a fact denied by him. It was established that the Complainant was a delinquent child having run away from her home and engaged in disobedient conduct. The Appellant called upon the Court not to believe her. What is however evident was that on examination she had a broken hymen and no bruises were noted on her genitalia. As correctly argued by the Appellant, a hymen can be stretched/missing following many factors. But in the instant case the Complainant attributed it to the fact of indulging in sexual intercourse. In the case of **Mark Oiruri Mose vs. Republic (2013) eKLR** the Court of Appeal stated that:

“...so long as there is penetration whether only on surface the ingredient of the offence is demonstrated and penetration need not be deep inside the girls organ.....”

And in **Erick Onyango Ondeng vs. Republic (2014) eKLR** the Court of Appeal held that:

“In sexual offences, the slightest penetration of a female sex organ by a male organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”

13. Therefore, to prove the act of penetration in the circumstances, it was not imperative for the Prosecution to prove the presence of bruises on the genitalia.

14. The issue to be determined is therefore, if the Appellant was the perpetrator of the act as stated by the Complainant. In her testimony the Complainant identified the Appellant as her boyfriend who had sexual intercourse with her several times. Her evidence was not discredited. The learned trial Magistrate observed the demeanor of the Complainant, cautioned herself and believed her having weighed evidence adduced by both the Complainant and Appellant. She did not fall into error. In the circumstances corroboration was not a requirement.

15. It is urged by the Appellant that he was a child aged **17 years, 8 months** at the point of arrest therefore the Court should have caused his age to be assessed. Evidence on record is that the Appellant was in employment then. At the point of defending himself he had legal representation and he did not raise the issue of his age or allege that he was not an adult. This having not been a fact in issue the Appellant cannot purport to raise it at the Appellate stage.

16. On the question of sentence, the trial Court imposed the minimum prescribed sentence for the offence. Having not overlooked any factor and acted on correct principles this Court cannot interfere with the sentence meted out. Therefore I affirm the conviction and sentence passed.

17. In the result, the Appeal lacks merit and is hereby dismissed.

18. It is so ordered.

Dated, Signed and Delivered at Nakuru this 13th day of December, 2018.

L.N. MUTENDE

JUDGE