



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 136 OF 2009

FW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Nakuru Chief Magistrate's Criminal Case No. 36 of 2008 by Hon. E. Tanui R M on 15/05/09).

J U D G M E N T

1. **FW**, the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Sub-Section (2)** of the **Sexual Offences Act 2006**. Particulars of the offence were that on the **26th** day of **March, 2008** in **Nakuru District** of the **Rift Valley Province** unlawfully had sexual intercourse with **MW** a child of the age of **12 years**.
2. He was tried, convicted and sentenced to **twenty (20) years imprisonment**. Aggrieved, he appealed on grounds that: The charge sheet was defective in form and in particulars; the *voire dire* conducted by the Prosecutor was accepted by the Court yet it was equivocal; crucial witnesses were not called; the medical report was incomplete; there was no age assessment report and the case was not proved beyond any reasonable doubt.
3. Facts of the case were that the Appellant herein violated the Complainant sexually on a date that she could not remember. The matter was reported to the police who investigated and charged the Appellant.
4. When put on his defence he denied having committed the offence. He testified that he married the Complainant's mother but her grandmother was opposed to their relationship therefore framed him up.
5. The Appellant canvassed the Appeal by way of written submissions where he urged that: the age of the Complainant and the fact of penetration were not proved. That the *voire dire* carried out was not proper as the Prosecutor did not ask questions that would test the child's knowledge and understanding of the oath and what it entailed to testify under oath.
6. That the biological mother of the Complainant should have been summoned to testify as to what actually transpired. That **MM** who allegedly responded to the distress call of the Complainant should have been summoned to testify. That a laceration was not proof of defilement as penetration should have been proved. That the medical officer who examined the Complainant only saw a bruise on the nose but not on the labia and that the story of defilement was not true that is why PW2 chased the Complainant at the outset when she talked about it.
7. In response, the State through learned Counsel **Mr. Omutelema** opposed the Appeal. He urged that evidence adduced was overwhelming; the identity of the Appellant is not in issue as he was a step-father of the Complainant and she used to live with him. That there was evidence of penetration. Injuries noted on the child's genitals and face were fresh and the allegation by the Appellant that he was framed by the child's grandmother was not put to her during cross examination.
8. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32)**.
9. The Appellant herein was stated to be the Complainant's step-father. She used to live with PW2 **WM**, her maternal grandmother before she went to live with her biological mother and the Appellant, her husband.
10. On the **28th March, 2008** the Complainant made a report to the police and was sent to hospital for examination. She was found with a laceration on the labia and her hymen was perforated. The Clinical Officer, PW4, **Jacob Chelimo** who examined her formed the opinion that the injuries were caused by a blunt object. According to him the injuries were three (3) days old. This was evidence that at the point of

going to hospital her hymen was interfered with. **Section 2** of the **Sexual Offences Act** defines penetration thus:

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;”

This was evidence of partial penetration therefore the act of penetration was proved.

11. The age of the Complainant per what is indicated on the P3 was **twelve (12) years old**. PW2 WM her maternal grandmother gave her age as **13 years**. In Court the Complainant stated that she was **12 years old**. In the case of **Mwalongo Chichoro Mwajembe vs. Republic, Criminal Appeal No. 24 of 2015 (UR)** it was stated that:

“...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...”

12. The Complainant’s grandmother at the point of testifying was her guardian therefore must have known her age. The Complainant was questioned prior to testifying and the Court formed the opinion that she understood the nature of the oath and would therefore give sworn evidence. What was not captured is if she had sufficient intelligence. However, the Court observed her and the age was not disputed by the Appellant at trial therefore I find the age having been proved to the required standard.

13. The Appellant has urged that the charge was defective. A charge would be fatally defective if it does not disclose the essential ingredient of the offence (**See Sigilani vs. Republic (2004) 2 KLR 480**). An Accused person must be charged with an offence that is known in law. The particulars of the offence must be framed in a manner that makes the Accused understand what is being alleged so as to prepare for his defence.

14. In the instant case the charge as framed enabled the Appellant to understand that he had violated the Complainant sexually but the actual act that he committed was not demonstrated by word. However, this did not make the charge fatally defective.

15. Regarding the Appellant being the perpetrator of the act, the Complainant explained vividly what transpired but she did not remember when the act took place. She narrated how she was taken by a lady she referred to as **MM** to her place where she stayed until her mother returned. That when she reported the incident to her mother, she just ignored and continued with her work. The following morning her mother had washed her clothes therefore she sought assistance from her grandmother. The complainant was cross-examined at length by the defence counsel. She was forthright, she said before her mother turned up while at **MM’s** place she explained to those who turned up what had befallen her. And as she informed her mother who did not bother doing anything she was in pain. It is for this reason that she woke up in the morning and went to her grandmother’s home and reported the incident. When PW2 her grandmother saw her she was walking with difficulty. At the point of being seen by the clinical officer, PW4, she had obvious injuries and she had a foul discharge. It was evident that she had been defiled.

16. For reasons known to the police they did not avail **MM** to testify. But the complainant was a child of tender age. **Section 124** of the Evidence Act Provides thus:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

17. In the judgment the learned trial magistrate stated thus:

“.....the person who rescued her when she called for help could not be traced as she had been displaced during post-election violence. The complainant’s mother was the wife of the accused. I carefully examined the demeanor of the complainant as she testified. She explained the horrible act did to her in the innocence (sic) of a child. I have no reason to doubt her testimony.....”

18. The court, for reasons given found the complainant to have been truthful. Even if the Complainant forgot the date when the act was perpetrated, there is evidence that she went to her grandmother on the 27th March, 2007 and was seen in hospital on the 28th March, 2007, three (3) days later. Therefore the act was done on the 26th March 2007 and the perpetrator was the Appellant. The conviction is therefore affirmed.

19. On sentence, a person who commits the offence of defilement with a child between the age of twelve and fifteen years is liable to imprisonment of not less than twenty years. The appellant was given the mandatory minimum sentence set by statute which I confirm.

20. In the result, the appeal lacks merit. It is therefore dismissed on its entirety.

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

L.N. MUTENDE

JUDGE