



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 76 OF 2017

GEOFFREY KIPKORIR RONO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Nakuru Chief Magistrate's Criminal Case No. 2 of 2008 by Hon. Faith Munyi S. R. M on 28/08/17).

J U D G M E N T

1. **Geoffrey Kipkorir Rono**, the Appellant was charged with the **offence of defilement** of the Complainant herein a **child aged ten (10) years old**.

2. Facts of the case were that on the **23rd day of December, 2007** the Complainant was in bed when a person entered the house, crawled into her bed, gagged her mouth using a blanket and threatened to kill her if she screamed. He removed her pants and used his penis to penetrate into her vagina. **PW2 AWN**, her mother, who had gone out of the house returned to find an intruder in the house. She called out for help as she pursued him. Police officers who were on patrol duties moved and arrested the person who turned out to be the Appellant. Investigations were carried out that culminated into the Appellant being charged.

3. When put on his defence the Appellant who testified under oath stated that on the material date he left his place of work going to **Likia** where he arrived at **8.10p.m.** and found people discussing politics. He was told not to be near them as he was a Kipsigis. All over a sudden he heard noise ahead. As he walked on he was stopped by the police and asked about the noise. The people who were shouting reached him and he was arrested. He was taken to Likia Police Station where he met the Complainant and her mother. Subsequently he was charged.

4. The learned trial magistrate considered evidence adduced and reached a finding that the Complainant was defiled and the perpetrator of the act was the Appellant. She convicted and sentenced him to **serve life imprisonment**.

5. Aggrieved by the conviction and sentence he appealed on grounds that:

- Medical evidence produced before court was not cogent;
- the age of the complainant was not proved beyond doubt;
- and that evidence adduced by witnesses was not corroborated.

6. The Appellant canvassed the appeal by way of written submissions. He urged that failure of the medical officer who examined the Complainant to find any discharge on the complainant was evidence of no masculine intervention and the torn hymen was not consistent with injuries sustained on the material day. In this regard he cited the case of **Michael Odhiambo – V R HCCRA No.280 of 2004** where it was stated that:-

“...the rapture of hymen per se was not conclusive proof of defilement.”

7. He dismissed the baptismal card produced and cited the case of **Kaingu Elias Kasomo –Vs- Republic** where it was stated that:

“Age of the victim of sexual assault, under sexual offences Act is a critical component, it forms part of the charge which must be proved the same way as penetration in the case of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will depend on the age of the victim.”

8. Further, he contended that the intruder blew off the lamp the mother of the Complainant was carrying, therefore it was dark and he was

arrested some 300 metres away which meant that the intruder must have been a neighbour.

9. He faulted the court for not reaching a finding that failure to produce the investigation officer watered down the prosecution's case and having dismissed the defence put up for no apparent reason.

10. The State through the Senior Assistant Director of Public Prosecutions, **Mr. Kemo**, opposed the appeal. He submitted that all elements of defilement were proved. That the intruder entered the house, undressed the Complainant and penetrated her. Although he ran away he was arrested shortly thereafter. When the mother of the Complainant who found him inside the house screamed, police officers who had escorted her until the gate returned and arrested him. That the Complainant who was ten (10) years old had a torn hymen and bruises which was evidence of penetration through sexual intercourse; and the sentence imposed was lawful.

11. 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*).

12. This being a case of defilement the prosecution was required to prove critical ingredients namely: the age of the complainant, the act of penetration and positive identification of the assailant (*See Charles Wamukoya Karani V Republic Criminal Appeal No.72 of 2013*)

13. In the case of **Hillary Nyongesa –Vs- Republic Eldoret Criminal Appeal No.123 of 2009** it was stated that:-

“Age is such a critical aspect in Sexual Offences that it has to be conclusively proved. Anything else is not good at all. It will not suffice. And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”

14. To prove the age of the victim herein the prosecution adduced in evidence a document from church which indicated her time of birth as 12th August 1996. Her mother, PW2, AWN also stated her date of birth. The Appellant faults the court for not recording details on the card in proceedings. The learned trial magistrate stated thus in her judgment:-

“...clearly stated that she was 10 years at the material time and her mother identified a card from their church.”

15. In the case of **Mwalengo Chichoro Mwajembe –Vs- Republic Criminal Appeal No.24 of 2015 (UR)**, the Court of Appeal 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.”

16. The prosecution relied on a card from the church which must have captured the exact age of the Complainant. The mother of the child who was seized of accurate information in respect of her age testified and gave her age. The medical officer, **PW4, Doctor Emmanuel Wekesa** stated that at the time of examination the Complainant was ten (10) years old. Then finally at the time of testifying the complainant was seized of sufficient intelligence of knowing her actual age. In the circumstances, it was proved beyond any reasonable doubt that at the time of the incident the Complainant was 10 years, four months old.

17. The complainant was taken to hospital immediately after the act. On examination she had a torn hymen and bruises on the vaginal canal. As a result it was concluded that she had penetrative sexual intercourse. It is urged that no seminal fluid or spermatozoa was not noted therefore the act was not done by a male.

18 In the Case of **Mark Oiruri Mose Vs Republic (2013) eKLR** the Court of Appeal stated thus:-

“...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed so long as there was penetration whether only on surface the ingredient of the offence is demonstrated and penetration need not be deep inside the girls organ....”

In the premises, the absence of spermatozoa or seminal fluid per se does not suggest that there was no penetration. Evidence of the act of penetration was proved by the prosecution.

19. The appellant was identified as the perpetrator of the act. However he vehemently denied having been the one. The complainant did not identify the assailant because the act happened in darkness. Her mother entered the room with a lamp that was blown out by the perpetrator of the crime.

20. The perpetrator of the act sneaked into the house after PW2 left for a neighbour's house to use a cellphone. On her way back she encountered police officers who had arrested people. They escorted her until her house. When she entered and found an intruder therein, she screamed as she chased after him. The police moved and arrested the individual. This was after they chased after him. **PW3 No.xxxx P.C. Francis Nyamu** who was on patrol with his colleagues saw a man emerge from a compound with a woman pursuing him. They arrested him.

21. The Appellant admitted having been in the vicinity and having heard screams. He however claimed that he was mistaken for the

intruder. However, evidence adduced by the prosecution that PW2 pursued him until the point of his arrest by the police is not challenged. In the premises the learned trial magistrate did not misdirect herself by reaching a finding that he was the intruder. Therefore all the ingredients of the offence of defilement were proved as required by the law.

22. It was urged further that failure to produce the investigation officer was detrimental to the prosecution's case. In the case of **Jeremiah Gathuku V. Republic, Criminal Appeal No.73 of 2008** the court held that:

“.....the effect of failure to call police officers in a criminal trial, including the investigating officer, is not fatal to the prosecution's case unless the circumstances of each particular case so demonstrate.”

Guided by the aforesaid decision, although the State is not supposed to treat a case as a contest between the complainant and accused by failing to avail all witnesses, where evidence adduced is sufficient to prove the case as in the instant case, failure to call the investigation officer is not fatal

23. On sentence, the child was of tender age, 10 years 4 months. The law provides for a sentence of life imprisonment.

24. Consequently, the appeal lacks merit. It is dismissed in its entirety.

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

L.N. MUTENDE

JUDGE