



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CRIMINAL APPEAL NO. 4 OF 2016**

**BETWEEN**

**ALFRED GETANGA ACHUKI ..... APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. S.A.Opande, SRM dated 25<sup>th</sup> November 2015 at the Senior Resident Magistrate's Court at Tamu in Criminal Case No. 7 of 2015)*

**JUDGMENT**

1. The appellant, **ALFRED GETANGA ACHUKI** was charged with the offence of defilement contrary to **section 8(4)** of the **Sexual Offences Act, 2006**. The particulars of the charge were that on the night between 13<sup>th</sup> and 14<sup>th</sup> April 2015 in Muhoroni District within Kisumu County, he intentionally caused his penis to penetrate the vagina of WAO, a child aged 16 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offence Act** based on the same facts. He was convicted on the principal charge and sentenced to 15 years' imprisonment. Aggrieved by the conviction and sentence, the appellant has now filed this appeal.
2. The appellant filed a petition of appeal dated 2<sup>nd</sup> February 2016 in which he attacked the judgment on several grounds. He contended that the trial magistrate erred in law and in fact in not properly analyzing the evidence on record especially the medical report. He contended that the trial magistrate failed to consider his defence which was believable and likely to lead to the conclusion that he was framed. In addition, he also contended that the prosecution failed to prove its case beyond reasonable doubt.
3. In addition to the grounds set out in the petition of appeal, Mr Lore, counsel for the appellant, submitted that the prosecution did not establish the element of penetration, He contended that PW 1 was found to be infected yet the appellant was free from any infection when he was examined. He also pointed to the fact that the complainant's evidence lacked credibility as she was engaged in a parallel relationship with a third party and confirmed she was pregnant from that relationship. Counsel also contended that the P3 form could not be relied upon as it contradicted the testimony of the witnesses.
4. Ms Osoro, learned counsel for the respondent, opposed the appeal. She submitted that prosecution proved all the elements of the offence and that in fact the testimony of the parallel relationship between PW 1 and the third party ought to have been excluded by **section 34** of the **Sexual Offences Act** which prohibits evidence of the complainant's sexual history. Counsel added that the PW 1 and the appellant were not strangers to each other and thus her testimony was credible.

5. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced to reach its own independent determination whether or not to uphold the conviction of the appellant (see **Njoroge v Republic [1987] KLR 19, 22**). In order to carry out this task it is necessary to outline the evidence as it emerged at the trial.

6. After a *voire dire*, the complainant (PW 1) gave sworn testimony. She told the court that she was aged 16 years attending secondary school and had come to Muhoroni during the school holidays to visit her sister. She recalled that on 13<sup>th</sup> April 2015 at 8.00pm, while she was at her sister's friend's house, the appellant came picked her up and took her to his home where she made him dinner. PW 1 testified that during that night they had sexual intercourse. At about 6.00am she went back to her sister's friend's place. Her sister's friend was not at home but she arrived shortly with her sister, PW 3, who interrogated her about where she had been. PW 3 took her to Koru Police Station then to the hospital where she was examined.

7. The complainant's sister, PW 3, testified that PW 1 had come to stay with her but went over to stay with her friend. While she was there, her friend told her that PW 1 had been communicating with her boyfriend and that she had gone to his place and had not come back by 8.00am. PW 3 decided to go to the appellant's house where she saw him emerge with PW 1. She stood aside while PW 1 left on a motorbike. She later went to her friend's place where she confronted the PW 1 about where she had been. She directed the police to arrest the appellant.

8. PW 5 produced the P3 medical report for the appellant and the respondent on behalf of his colleague who was under interdiction. The examination conducted on PW 1 on 14<sup>th</sup> April 2015 did not reveal anything remarkable save that she was pregnant. Likewise, nothing remarkable was detected when the appellant was examined.

9. The investigating officer, PW 6, testified that PW 1 was brought to the Police Station by PW 2 on 14<sup>th</sup> April 2015 and reported that PW 1 had spent a night at the appellant's home. He recorded the complaint and instructed another officer, PW 7, to escort PW 1 to hospital for examination. PW 6 confirmed that he knew the appellant. PW 7 testified that she took the hospital for examination. She thereafter left with PW 2 to locate the appellant whom she arrested that morning.

10. In his sworn testimony, the appellant told the court that on the material day he was visited by his fiancée, JM (DW 2) and had been with her the whole night. At about 9.00am, he left to shop for lunch. He was arrested by PW 7 on his way back home. Before he was taken to the police station, he called another rider who took the items he had bought to his house. DW 2 told the court that she had come to visit the appellant on 10<sup>th</sup> April 2015 and that on the morning of 14<sup>th</sup> April 2015, the appellant left to buy milk in the morning. She recalled that later that morning, a motorbike rider, who had been sent by the appellant, brought her milk, meat and cabbage and informed her that the appellant had been arrested.

11. The main issue for determination in this appeal is whether the prosecution proved, beyond reasonable doubt, that the appellant defiled the complainant. In order to prove its case under **section 8(1)** of the **Sexual Offences Act**, the prosecution must show that the appellant did an act that amounted to penetration of a child. "*Penetration*" under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

12. PW 1 gave a detailed account of sexual intercourse with the appellant on the material night. When confronted by PW 3 on the next day, she told her what had taken place. When she was examined at the hospital, the tests were negative for any sign of defilement on the previous night. The appellant contended that the fact of PW 1's pregnancy by a third party was exculpatory. PW 1 readily admitted that she was pregnant by another person. In a case of defilement, the issue is not whether the victim became pregnant either by the accused or by another person but whether penetration was proved. It was thus immaterial to show that appellant was the cause of the pregnancy. In **Ambrose Mwanindo Ngwatu v Republic MLD CA CR APP No. 54 of 2013[2016]eKLR** observed that;

*In a charge of defilement, what is required is proof of penetration not proof of paternity. We agree*

*that proof of paternity may be proof of penetration when fertilization and sexual intercourse takes place in accordance with the order of nature. However, paternity is not proof of penetration in in-vitro fertilization. In the instant case, from the testimony of PW1, we are satisfied that there is direct evidence on record to the required standard that proves penetration of the appellant's genital organs to the complainant's genital organs.*

13. The other question raised by the appellant is whether the medical evidence, in the form of the medical report, necessary to establish penetration? The Court of Appeal has upheld that the principle that the absence of medical evidence is not a decisive as the fact penetration can be proved by oral testimony of the victim or by other circumstantial evidence (see ***Kassim Ali v Republic***, MSA CR APP NO. 84 of 2005[2006]eKLR and ***Dennis Osoro Obiri v Republic*** NRB CR APP NO. 279 of 2011 [2014]eKLR). In ***Geoffrey Kioji v Republic***, NYR CR. APP. NO. 270 of 2010 (UR) where the Court of Appeal observed as follows:

*Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.*

14. From the foregoing, the question of the appellant's guilt is to be resolved by whether the trial magistrate believed PW 1's testimony in the absence of corroborating evidence. On the other hand, the appellant raised an alibi supported by DW 2. An accused does not bear any burden of proving the alibi, but he ought to raise it early enough so that it can be tested by the prosecution. Where the accused does not raise it early enough, then the duty of the court is to consider it in light of prosecution evidence and determine whether it has been disproved (see ***Kiarie v Republic*** [1984] KLR 739 and ***Karanja v Republic*** [1983] KLR 501).

15. As regards the issue of the issue of corroboration, **section 124** of the ***Evidence Act*** provides as follows:

*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.* [Emphasis added]

16. To comply with the proviso to **section 124 of the Evidence Act** the trial magistrate is required to state in the proceedings the reasons why he believed the complainant. The trial magistrate did not, in the judgment record the reasons why he was satisfied that the appellant was telling the truth. In addition, the trial magistrate did not address the alibi testimony of the appellant and DW 2 in light of the prosecution evidence. Had he done so he would probably have arrived at a different conclusion on the credibility of PW 1's testimony or upheld the appellant's alibi. I would also add that in assessing the credibility of PW 1, the trial magistrate relied on the fact that the appellant once carried PW 1 to court on his motorbike. This fact arose in cross-examination of the appellant and was never put to PW 1.

17. For the reasons I have outlined above, I find the conviction unsafe. I allow the appeal and quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at KISUMU this 23<sup>rd</sup> day of January 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Lore, Advocate instructed by the appellant.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.