



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL APPEAL NO. 70 OF 2015

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 614 of 2014 of the Chief Magistrate’s Court at Naivasha – S. Muchungi, RM)

J W K.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was convicted for the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. The particulars stated that on diverse dates between 27th day of February 2014 and 21st day of March 2014 at [particulars withheld] in Njoro District within Nakuru County, he intentionally and unlawfully caused penetration of his male genital organ (penis) into the female genital organ (vagina) of **J. N. M.** a child aged 15 years.
2. The Appellant was, following conviction sentenced to serve 20 years imprisonment. Aggrieved with the outcome, he filed an appeal to this court, raising eight grounds of appeal in his memorandum through Messrs Gichuki Advocate.
3. During the trial in the lower court, the prosecution had called five witnesses. The gist of the prosecution case was as follows. The complainant **J.N.M (PW1)** was one of six children born in the course of a troubled marriage between **PW1’s** father **D.M. (DW3)** and one **P. M.** whose whereabouts were unknown. **PW1** was born in 1998 but after 2000 the family broke up. The children remained with **DW2** at [particulars withheld], Gilgil but, apparently unable to care for them **DW2** placed them under the care of his aged parents in Nakuru.
4. In 2013 the Appellant and his wife **L.W.W. (DW3)** took in the complainant ostensibly to take her to school but kept her at home to care for their children at their [particulars withheld] home in Njoro. While the Appellant operated a *boda boda* business, **DW3** ran miscellaneous businesses which at times took her away from home. During one such occasion, on 27/2/2014 while **DW3** was away in Nakuru, the Appellant came home and demanded water for a bath, after all the other children had slept. After washing only his feet in the sitting room he switched off the lights and directed **PW1** to go to his bedroom where he undressed her and defiled her.
5. He later let her go amid threats not to report the incident to anyone. A similar incident took place on 21/3/2014 when **DW3** was away on a business trip. On the next day the complainant determined to leave the home and started trekking towards Gilgil. **PW1** spent several nights with good Samaritans on the way. But a man she met in Nakuru raped her in the bushes. Eventually on 24/3/2014, she arrived at

Gilgil. At 7.00am she approached a stranger, **A N M (PW2)**, a shopkeeper at [particulars withheld]. When **PW2** heard **PW1**'s story she contacted the Children's Office and then a report was made to **APC Kimutai (PW3)**.

6. **PW3** handed over **PW1** to **Sergeant Frida Ture (PW4)** of Gilgil Police Station. Investigations commenced with the examination and treatment of **PW1** at Gilgil District Hospital. The Appellant was eventually traced, arrested and charged.

7. The Appellant upon being placed on his defence elected to give a sworn statement and called two witnesses, being **DW2** and **DW3**. The gist of the defence case was that the complainant was a difficult child but the Appellant and **DW3** out of compassion, took her in, to look after their children and also go to school. This was after **DW2** and his parents had proved unable to contain her.

8. That the complainant was indisciplined and would leave their home for escapades with boys but would not take correction. That eventually in mid March, 2014 the complainant escaped from their home after one such episode, and the next witnesses heard was that she was alleging an act of defilement against the Appellant. They narrated various incidents of indiscipline by the **PW1** while in their care and the care of other relatives, including **DW3**'s sister in Kisii.

9. **DW3** denied that she would spend nights away from home while on business and asserted that, at the material time she had stopped the clothes business she used to operate. The Appellant for his part denied ever defiling the complainant, while her father **DW2** described her as a liar, a 'chameleon' and a problem child. To him the Appellant and **DW3** were good Samaritans who had accepted to take in his difficult daughter and to care for her.

10. In arguing the 8 grounds of appeal, the Appellant submitted under four points as follows:

- “1. the medical evidence did not corroborate the complainant's evidence.**
- 2. the trial court shifted the burden of proof on the Appellant and unfairly dismissed his defence.**
- 3. Crucial witnesses were not called to testify.**
- 4. In considering the evidence the trial court did not consider all the circumstances in respect of the complainant's credibility especially relations with the Appellant's family.”**

Written and oral submissions were made in support of the four heads.

11. For his part, the Director of Public Prosecutions through Miss Waweru opposed the appeal and supported the conviction, asserting that all the elements of the charge sheet were proved through cogent evidence.

12. The duty of the first appellate court as stated in **Pandya -Vs- Republic [1957] EA 336** is that:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the

appellate court has not seen.”

13. In light of this, I have reviewed the evidence before the lower court afresh. I have also considered the submissions made in respect of the appeal. There is no dispute as to the relationship between the Appellant and the complainant, or the fact that the complainant was aged between fourteen and fifteen years, and in the material period between 2013 and March 2014 living with the Appellant’s family at Njoro. That the complainant left the house on 22/3/2014 and travelled to Gilgil where she reported the offence to police on 24/3/2014. There is no dispute that the complainant was defiled by some unknown person on the way to Gilgil.

14. Medical evidence confirms that indeed she had been involved in sexual activity – the hymen was broken and the vaginal walls were bruised. The trial magistrate correctly found that the prosecution had proved the complainant’s age and the issue of penetration.

15. In my considered view, the real sticking point in this case was whether despite the Complainant’s defilement while *enroute* to Gilgil, the Appellant had previously defiled her in the period when she lived at his home. On this question, the trial magistrate delivered herself in part as follows:

“On the last issue of who the perpetrator is, it is my holding that the evidence is sufficient to prove that the Accused herein was the initial perpetrator. Though the minor was subsequently defiled by an unknown person, the evidence shows that she was initially defiled by the Accused and that was the reason why she ran away from home. The subsequent defilement does not negate the fact that she had been previously defiled by the Accused.”

16. On the latter aspect, I do agree that the fact of subsequent defilement does not negate previous defilement. The Appellant’s complaint regarding the medical evidence is that it did not corroborate evidence by the complainant that the complainant was defiled by the Appellant. I do not see any such specific finding in the judgment of the court. The trial court appears to have been alive to the fact that the complainant spoke of two incidents of defilement between 21st and 24th March 2014 at the home of Appellant.

17. The statement that **“the doctor concluded that the minor had been defiled which evidence corroborated her evidence”** did not refer to any particular incident. But judging from the contents of the judgment following the said statement, all that the court was saying was that medical evidence proved the complainant had been involved in sexual activity prior to examination. This was not disputed.

18. It seems to me that, the trial court did not consider the recency of the genital injuries and indicated as two days old in the P3 form, and other injuries to the neck and head in this connection. Nor whether it was possible for the complainant to have sustained the injuries after the second assault by the Appellant. Because the complainant’s evidence was that her first assault at the hands of the Appellant was on 27/2/2014 and she had not had sex before. Thereafter she was defiled a day before she left home, roughly 3 days prior to her examination on 24/3/2014. From the complainant’s narration the second defilement occurred around the night of 23rd March.

19. In my own view, the medical evidence tendered confirmed that the complainant had been involved in sexual activity prior to examination, whether once or on several occasions. The bruises may have been sustained in the sexual encounter on 21/3/2014 and/or on 23/3/2014. At any rate the complainant had been defiled. The corroborative value of the medical evidence cannot be extended further. I agree with the Appellant’s submissions that the trial court should have given a more careful consideration of this evidence than is demonstrated in the judgment. I however do not accept the suggestion that the medical evidence is altogether valueless for the purposes of this case.

20. Besides, under the proviso to Section 124 of the Evidence Act, the court was entitled to return a conviction based on the sole testimony of the complainant if it believed her evidence, for recorded reasons. Thus grounds 1 and 2 of the appeal on the lack of corroborative testimonies have no merit. I think the questions raised in ground 4, 6 and 7 go to the credibility of complainant’s evidence, while

grounds 3 and 8 reflect a complaint that the trial court shifted the burden of proof on the Appellant and unduly dismissed his defence.

21. Regarding the credibility of complainant's testimony, the trial court noted in the judgment that:

“The minor’s accounts of event was quite detailed; how the Accused used to wake her up at night, take her to bed, remove his clothes and hers and then defile her. Her narration of events to PW2 who she first met, to the police officers, at the hospital and even in court was consisted all through without any contradictions.” (sic)

On this account, the trial court apparently believed the evidence of the minor.

22. I have on my own reviewed the evidence of the complainant. It is consistent concerning the two incidents of defilement on 27/2/2014 and 21/3/2014 even though **PW2** said that **PW1** reported 3 incidents of defilement to her. Clearly, the complainant had been living with the Appellant and his family for about a year at the time she left. Something caused her to leave the home on 22/3/2014. According to the complainant it was the second incident of sexual assault. She also explained that there was an incident on 22/3/2014 after the complainant and other children were sent to go to ask “Baba Millie” to come help the Appellant to plant on the farm. Apparently she went out and when she returned to the home the Appellant chastised a niece for accompanying the complainant to the home of “Baba Millie”

23. The complainant left home soon after the Appellant and other children went off to the shamba. She left the young child in her care with a neighbour. It is not clear who “Baba Millie” was but seemingly the complainant knew him. There is no evidence that the complainant complained to Baba Millie or his family or the neighbour about the sexual assault on the previous night. Similarly, she had not informed anyone after the first assault on 27/2/2014.

24. On her own testimony, the complainant had been through much and at 15 years was seemingly fairly hardened. If she had determined already to leave the Appellant's home, why did she not complain to ‘Baba Millie’, his family or the neighbour. After all she would be out of the control of the feared aunt. In cross-examination she said:

“We slept with you on 27/2/2014. I could not inform anyone but there is a day I went to the police but they did not assist me. There is a day I informed other girls..... The girls also told aunt and she got infuriated she beat me and the other girls. I did not tell aunt because I fear her.....”

In re-exam she said she had reported to Njoro Police Station on an unstated date but was not assisted. That she also reported to the area chief Njoro who apparently took no action. Is this believable

25. The above alleged efforts refer to the incident of the first assault. Thus, the complainant did not attempt to report to anyone at Njoro regarding the 2nd incident and walked all the way to Gilgil where her father lived. On the way, she by passed other police stations, no doubt. **DW2** said that his mother and other relatives of the complainant's mother lived in Njoro. Notably **PW1** did not share her grievances with the two women who hosted her while on her way to Gilgil. No palpable reason can be discerned.

26. Apparently she also did not mention her latest ordeal at the hands of a stranger at Nakuru on 23rd March, else in the state **PW2** described her in, her host would have referred her to the police at Nakuru. At any rate, she herself did not approach police at Nakuru. Upon reaching Gilgil. She did not go to her father's home. Instead she approached **PW2** to show her the local police station. She also gave her father's telephone contact to **PW2**. According to **PW2** the complainant had money to purchase candy but did not reveal her ordeal until probed.

27. This is how **PW2**, in part, described her first encounter with **PW1**:

“On 26/3/2014, I was at home in the shop at about 7.00am in the morning, while washing the

shop a strange girl came and wanted me to sell her sweets. She asked me whether I know where police station is. I asked her why she wanted to go there. She told me she wanted to know how she can go back to school.

She told me she had come from Njoro and was staying with her aunt. The aunt had taken her in and promised to take her to school but instead made her to stay at home and do household chores. I asked her whether I could hire her but she refused and told me she wanted to go to school.

There is a children's home near [particulars withheld] and so I went to a neighbour to seek advise because the man of the house works there. The girl when I told her to sit, she could not sit well. Her posture was bad. She was sitting at the edge of the chair with only one buttock and as though she was in pain. She did not walk fast. It was as though she was in pain.

I gave her tea and asked her what was wrong. We were seated outside. She told me she has an uncle who operates a boda boda whenever the aunt leaves, the uncle makes her his wife. She said the uncle used to lie with her and had sex with her. I asked her why she had not told her aunt. She said the aunt is harsh.

She told me the aunt usually leaves to sell clothes. I asked her whether she had had sex before and to explain what happened. She told me the first time the aunt had gone to a far off market. It happened at night; the other children were sleeping. The uncle then told him to wash the sheets so that the aunt did not suspect.

She told me she did not tell the neighbours because they could in turn tell the aunt and if chased away she could not know where to go. The uncle told her never to tell the aunt or any other person. She told me the uncle defiled her three times. The 3rd time, she said she decided to run off because it was too much and painful and did not continue to persevere.”

28. According to the Appellant, **DW2** and **DW3** the complainant was an unruly child who left home in a huff because she had been warned severally about affairs with boys and her refusal to return to school. The complainant admitted that the Appellant had earlier purchased uniform for her with a view to taking her back to school meaning she had been enrolled. Before the Appellant's wife **DW3** asserted 'final warning' to the complainant, the complainant and another niece according to **DW3** had left home on their own frolic on 18/3/2014 and upon their return, the Appellant disciplined his niece. He then said he did not want the complainant to continue living there.

29. All in all, according to complainant, life in the Appellant's house was an unhappy experience. The Appellant and his wife viewed her as spoilt or difficult child. Clearly the relationship between them was far from rosy. In as much as the complainant claimed that she decided to flee because the Appellant had sexually abused her, it seems likely that she wanted to move out because she was not happy there; especially due to the frequent quarrels. When **PW2** initially asked the complainant her purpose for visiting the police station, her response was that she wanted to find out how to go back to school. She probed further because of the way the complainant was walking and sitting. That is when **PW1** raised the matter of 3 incidents of defilement by the Appellant and once by a stranger *enroute* to Gilgil.

30. On the evidence on record, there seemed to be much unhappiness and blame between **PW1** and the defence witnesses. Such that it is possible for parties to attempt to tar each other. This was a relevant matter for consideration by the trial court but seemingly it was overlooked. The Appellant's complaint that the trial court shifted the onus of proof and peremptorily dismissed the defence is accurate in some respects. Whereas **PW1's** evidence seemed consistent, detailed and therefore accepted by the trial court, the defence too was sufficiently detailed, and in my opinion deserved better consideration than mere moral judgment, as reflected in the judgment of the trial court.

31. The Court of Appeal in the case of **Ouma –Vs- Republic (1986) KLR page 619** held that:-

“At the time of evaluating the prosecution’s evidence, the court must have in mind the accused person defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility to the defence being true. If there is doubt the benefit of that doubt always goes to the accused person. That does not appear to have been done in the case.”

32. It is true that **DW2** appeared to be a failed father as much as the complainant was a troubled teenager, whose parents seemed unable and or unwilling to care for their own children. And obviously family members forced to care for them were possibly resentful and felt burdened. That may explain the alleged “harshness” of **DW3**.

33. The harshness of **DW3** or failure by **DW2** as a father however do not transform the complainant into a victim saint whose words were all truth, and the defence case pure lies. It was incumbent upon the trial court, firstly to satisfy itself that the prosecution had borne its onus of proof, without any requirement on the part of the Appellant to prove his innocence. Secondly and simultaneously, the trial court was duty bound to weigh carefully all the evidence before it, with sufficient circumspection. Particularly in light of the soured relationships and possible bitterness on the part of the complainant and her relatives, without being swayed by the moral blame rightly attributable to the witnesses. That is, without prejudice. Had the trial court done so, it would have noted that the complainant’s testimony also raised questions as to its credibility and that, altogether the defence evidence was not worthless as it tended to cast doubt on **PW1**’s evidence.

34. My considered view of this case is that when all the evidence is considered, there remains a degree of reasonable doubt as to whether the Appellant really defiled the complainant. Or whether, the complainant made up this entire episode against the Appellant to fix her host family for perceived mistreatment, as previously threatened, and to create reason for leaving that home for good, in the process of which she suffered a defilement ordeal through a stranger.

35. After all **DW2** in his testimony told the court that as at the time of his evidence, **PW1** had already left the children’s home where she had been committed and her whereabouts were unknown. Evidently, the parenting failure by her parents had left the complainant in a lurch, possibly emotionally scarred and destabilized. For such a needy case, it is not unusual to fail to see or appreciate the love or care of their benefactors, or to be resentful of them.

36. I have anxiously considered this case in light of depressing circumstances attending it. And for all the foregoing I have come to the conclusion that the conviction herein is not safe. I would allow the appeal and give the Appellant the benefit of doubt that he was entitled to in the circumstances of this case. In the result, the conviction is quashed and the sentence set aside. The Appellant is set at liberty forthwith unless otherwise lawfully held.

Delivered and signed at Naivasha, this **9th** day of **March, 2017**.

In the presence of:-

Mr. Mutinda for the DPP

Mr. Gichuki for the Appellant

C/C : Barasa

Appellant : present

C. MEOLI

JUDGE