



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 61 OF 2012

SIMON NJENGA WANYOIKE APPELLANT

VERSUS

REPUBLICSTATE

(Appeal from the Ruling of the Chief Magistrate's Court at Nakuru

Hon. P. Mayova –Resident Magistrate delivered on the

20th March, 2012 in CMCR Case No. 97 of 2011)

JUDGMENT

The appellant **SIMON NJENGA WANYOIKE** has filed this appeal to challenge his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts.

The appellant had been arraigned before the trial court on 8/6/2011 facing a charge of **DEFILMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(3) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

“On the 5th day of June, 2011 in Nakuru district within the Rift Valley province unlawfully and intentionally committed an act by inserting a male genital organ (penis) into the female genital organ (vagina) of F W a child aged thirteen years which caused penetration”.

The appellant entered a plea of ‘**Not Guilty**’ to the charge and his trial commenced on 1/11/2011. The complainant **F W** told the court that she was 13 years old. She testified that on 5/6/2011 at about 7.00pm she was sent by her mother to go and close the gate of their compound. Whilst she was closing the gate the appellant emerged and pulled her to a nearby shamba where he proceeded to defile her. After the incident the complainant went home and reported to her parents what had happened. She was then taken to Njoro Health Centre where she was examined and treated.

The matter was reported to police who commenced investigations. The appellant was eventually arrested and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He opted to give a sworn statement in which he denied having defiled the complainant.

On 20/3/2012 the learned trial magistrate delivered his judgment in which he convicted the appellant on the charge of Defilement and thereafter sentenced him to serve twenty (20) years imprisonment.

Being aggrieved by both his conviction and sentence the appellant filed this appeal.

The appellant who was not represented by counsel during the hearing of his appeal opted to rely entirely upon his written submissions which had been filed in court. **MR. MOTENDE** learned State Counsel made oral submissions in which he opposed the appeal.

This being a first appeal this court is required to re-examine and re-evaluate the evidence on record and to draw its own conclusions on the same (see **AJODE Vs REPUBLIC [2004]2 KLR 82** similarly in **MWANGI Vs REPUBLIC [2004] KLR** the court held

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court’s own decision on the evidence”.

The key issues for determination in any case of defilement are

- (1) The age of the victim
- (2) Was the child actually defiled as alleged
- (3) The identity of the perpetrator

The determination of the age of the complainant is a critical issue as the age of the victim will determine the sentence to be imposed if the accused is convicted. In **ALFAYO GOMBE OKELLO Vs REPUBLIC [2010] KLR**, the Court of Appeal held as follows

“In its wisdom Parliament chose to categorize the gravity of that offence (defilement) on the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt....”

In this case the complainant told the court that she was 13 years old. **PW2 P N I** the complainant’s father and **PW4 M W** the child’s father both confirm the age of their daughter to be 13 years. What better evidence of her age could there be than that of the parents who bore the child. In addition the complainant’s Immunization Card was produced as an exhibit **P. exb 3**. This is an official document issued by the Ministry of Health which gave the child’s date of birth as 12th April, 1997. Having been born in April, 1997 the complainant was aged approximately 13½ years in June 2011 when this incident occurred.

The complainant told the court that on the material date she had gone to close the gate of the family compound at about 7.00pm. Whilst there, the appellant and grabbed her and pulled her to a neighbouring maize plantation. In her own words the complainant narrates her ordeal as follows

“..... while in the farm inside the maize the accused made me lie down. He removed my pant and then he removed his trouser and proceeded to insert his penis into my vagina. He had sex with me forcefully. I started bleeding from my vagina”.

The complainant here has given a clear account of what transpired. The complainant was a young girl and she would have no reason to claim that she had been defiled if no such incident has occurred.

PW2 who was the complainants father and **PW4** her mother both confirm that the child went out to close the gate. However she did not return home immediately. The complainant returned after 30 minutes with mud on her clothes. The child’s pant was also blood stained. She reported to her parents that she had been defiled. The parents took her to Njoro Health Centre where she was examined and treated.

PW3 ROBINSON KIPSUT is the clinical officer who examined the child. He noted redness in her genital area and a slight tear on her vagina. **PW3** also noted that there was blood on the child's pant. He filled and signed the P3 form which was produced in court as an exhibit **P. exb 2(b)** as well as her initial treatment card **P. exb 2(a)**.

I note that P3 made no mention of a torn or missing hymen which is classical proof of penetration. Section (2) of the Sexual Offences Act defines the term '**penetration**' as follows:-

“Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.

Therefore even a partial insertion of the penis into the genital organ of the victim will suffice as proof of penetration. It is not essential that the sexual act be concluded. In this case, the redness of the vaginal area, the tear in the vaginal area is proof of forcible entry. The blood stained pants **P. exb 1** which the child identified as hers are all proof that at the very minimum partial penetration had occurred. I therefore find that the act of defilement has indeed been proved.

The next issue is that of identification. Is there sufficient evidence to point at the appellant as the perpetrator of the offence?

The complainant herself identified the appellant as the man who defiled her. The incident occurred at 7.00pm. Undoubtedly darkness was setting in. The appellant led the child to a maize plantation where he lay on top of her. The two were in close bodily contact and due to this proximity. I have no doubt that the child was well able to see and identify her attacker.

Further there is evidence that the appellant was a neighbor and a friend to the child's father. Therefore she knew him well. Under cross-examination the complainant states

“I know you. I identified you at the police station I had seen you before many times.....”

PW2 the complainant's father confirms that

“I know you. You are a friend of mine.....”

PW4 the child's mother told the court that the complainant told her that it was '**Njenga**' who had defiled her. Thus the complainant identified the attacker by name to her parents immediately after the incident. The fact that the child knew the appellant before means that she was in a position to recognize him. Recognition of an assailant was held in the case of **ANJONONI & OTHERS Vs REPUBLIC [1989] KLR** to be, **“more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”**.

The appellant was a friend to the child's father. She states that she had seen him several times before. I find that there was no possibility of a mistaken identity. I am satisfied that there has been a clear positive and reliable identification of the appellant.

In his defence the appellant denies the charge. His defence amounts to a bare denial. The complainant was a young girl. She had nothing to gain by lying against the appellant. In his judgment at page 4 line 15 the trial magistrate observed as follows

“I watched the demeanour of the complainant as she testified. I have no reason to doubt her evidence.....”

This was the observation of the trial magistrate who heard and saw the complainant testify I have no reason to doubt his impression of the child's demeanour.

On the whole I am satisfied that the prosecution did prove the charge beyond reasonable doubt. The

appellant's conviction was in my view sound and I do uphold that conviction. The sentence of twenty (20) years imprisonment is the mandatory minimum sentence as provided by Section 8(3) of the Sexual Offences Act. I do confirm that sentence.

Based on the foregoing this appeal fails and is dismissed in its entirety.

Dated and delivered in Nakuru this 5th day of May, 2017.

Appellant in person

Mr. Chigit for DPP

Maureen A. Odero

Judge