



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**  
**CRA NO.72 OF 2010**

**BETWEEN**

**GILBERT SHIKONDI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from original conviction and sentence in Kakamega C.M.CR.Case**

**No.302 of 2009 delivered on 30/03/2010 by Hon. H.I Ongudi –Chief Magistrate)**

**J U D G M E N T**

**Background**

1. The appellant herein GILBERT SHIKONDI was charged before the Chief Magistrate's Court with the offence of Defilement of a girl contrary to Section 8(1) as read with Section 8(4) of the Sexual offences Act No.3 of 2006. Particulars of the offence were that on the 5<sup>th</sup> day of February 2009 at [particulars withheld] in East Kakamega district within Western province the appellant unlawfully and intentionally inserted his genital organ namely penis into the genital organ namely vagina of C.M.A a girl aged seventeen (17) years.

2. In the alternative he was charged with the offence of indecent act with a girl contrary to Section 11 of the Sexual Offences Act No.3 of 2006 Laws of Kenya. The particulars of the offence are that on the 5<sup>th</sup> day of February 2009 at [particulars withheld] in East Kakamega district within western province unlawfully and intentionally contacted his genital organ namely penis into the genital organ namely vagina of C.M.A a girl aged 17 years.

3. The appellant was found guilty and convicted of the main count and sentenced to serve fifteen (15) years imprisonment.

**The Appeal**

4. Being aggrieved and dissatisfied with the said conviction and sentence of fifteen years imprisonment for the said offence, the appellant filed the following home-made grounds of appeal on the 6/04/2010:-

1. THAT he did not plead guilty to the above Appended charge. (sic)

2. THAT the trial Magistrate erred in law and facts in convicting him when the evidence on record was uncorroborated, inconsistent, fabricative and lacked probative values. (sic)

3. THAT the Prosecutions case lacked sufficient evidence to warrant a conviction.

4. THAT the trial Magistrate erred in law and facts when she failed to notice that no exhibits were produced in Court i.e. blood stained clothes etc.

5. THAT the trial Magistrate erred in law and facts when she did not warn herself of convicting him when she never noticed that PW1 never bothered to raise an alarm before at the time of the alleged offence or immediately after so that eye witnesses could be found to give impartial evidence.

6. THAT the trial Magistrate erred in law and facts when she rejected his defence which created a reasonable doubt on the Prosecutions case.

5. The appellant filed his written submissions on the 29/10/2015 and during the hearing of the appeal, he submitted that the problem that was in the home was a land dispute and that is what the Police told him was the case but when he got to Court he was charged with defilement which he denied. He also submitted that the Investigating officer did not testify nor was he taken for medical examination. He asked this Court to allow the appeal.

6. Mr. Omwenga for the State opposed the appeal. He submitted that there was no need for an identification parade because the appellant was known to the complainant at least for the short time they were together. He added that there was no need for the production of a birth certificate as it is not a requirement that it be produced because other sources of the information can be resorted to prove age.

7. Counsel also submitted that the evidence by PW1 as to her age was clear from the baptismal card which indicated that PW1 was 17 years old as at the time of commission of the offence. Mr. Omwenga also sought to rely on the P3 form which gave PW1's age as 18 years. It is important to note that the P3 form is not used as an age assessment document, so it is not the ultimate document for proof of age.

8. Mr. Omwenga also submitted that there was no need for a DNA test as the evidence against the appellant was clear. He also submitted that there was no need to analyze the spermatozoa found in the complainant's vagina since the fact of defilement had been ascertained. Regarding sentence, Counsel submitted that the sentence meted out to the appellant by the trial Court was both lawful and proper and was not excessive in the circumstances.

### **First Appeal**

9. This is a first appeal. It has been held that on a first appeal this Court is duty bound to re-examine and re-evaluate the date of the evidence on record, bearing in mind only that it neither saw nor heard the witnesses when the case was being heard in the trial Court, and to come up with its own findings and conclusions: See the cases of **PANYA –VS- REPUBLIC [1957] E.A 336** and **KARIUKI KARANJA – VS- REPUBLIC [1986] KLR 160.**

### **The Prosecution's Case**

10. The Prosecution called 4 witnesses in support of its case against the appellant. The complainant who testified as PW1 told the trial Court that she was born on 12/12/1992 and that she was 17 years old when the incident complained of occurred. To support her claim that she was born on 12/12/1992, PW1 produced her baptismal card as PExhibit 1.

11. PW1 further testified that on 05/02/2009, she left her home at Musoli and went to visit her sister C who lives at Ishiulu. She was to meet her sister at Khayega. She boarded a matatu and arrived at Khayega at about 2.40pm, but on arrival and for quite a while C did not appear. Upon consultation with

her mother, PW1 was advised by her mother to board a “boda boda” or motor cycle to Ishiulu primary school and on arrival there, she would ask to be shown the home of P M. PW1 did what her mother told her. The first boda boda took her up to Shinyalu junction where she found the appellant who was among other boda boda operators. On enquiry, the appellant confirmed to PW1 that he knew where Ishiulu primary school was and that he could safely take PW1 there. The appellant also claimed that he knew P M who was his neighbour.

12. With the assurance from the appellant PW1 boarded the appellant’s motor bike at about 4.00pm. The appellant asked PW1 whether she had used the route before but she answered in the negative. During the bumpy ride, the appellant engaged to know more about PW1’s sister and also sought to know at what age PW1’s sister got married. At Shinyalu market, the appellant informed PW1 that they were now halfway through the journey. Since PW1 had never been to her sister’s home, she could not doubt what the appellant was telling her.

13. On the way the appellant stopped at a funeral shortly and thereafter they continued with the journey. She (PW1) commented to him that it was a long journey. When they reached a certain home the appellant told her they had arrived. He alighted and instructed her to enter the home and to close the gate. He told her that that was her sister’s place while the other side was Matayo’s home. The appellant then walked around the house and on coming back to where PW1 was, he told her that her sister had gone out briefly. The appellant then asked PW1 to enter the house and wait. PW1 did so and sat in the sitting room while the appellant was standing at the door. While the two of them were in the house, the appellant started touching her on the head, back, breasts while telling her that he loved her. She started screaming. The appellant then held her neck and warned her that if she joked he would kill her.

14. He then dragged her to the bedroom and told her that he had to have sex with her. He removed her clothes namely, skirt, blouse and panties and left her only in a camisol. He placed her on the bed and then removed his clothes. She could not scream again after the threats. The appellant then climbed on her and slept on her. He removed his penis and inserted it into her vagina. She felt pain as he continued pushing it inside. He would remove his penis then wipe himself and insert it again into her vagina. He did that thrice. Then he got up, dressed and left her there. She then dressed up and went to the sitting room and sat. She asked him whether they were at her sister’s place. He gave her vegetables to prepare as he went to the posho mill. She tried to look for her bag but did not find it. So she left and went out to look for the village elder. She was able to trace the home of the village elder Andrew Khamusini Kujani who testified as PW2. At the home, PW1 only found PW2’s daughter. They then waited for the village elder who came and took her to the hospital at Shinyalu. They went back to the village elders home where she slept and also managed to call her parents who came the next day and took her to hospital.

15. PW1 also told the Court that when she enquired from the village elder where Ishiulu primary school was, she was told that they had left it far behind them. PW1 was also told by the village elder that the appellant was a man of questionable character.

16. PW1 further testified that her mother came on the 6<sup>th</sup> and they went to the hospital at Kakamega Provincial General Hospital after being given a letter by the Assistant Chief. She recorded her statement on the 9<sup>th</sup>. She showed the trial Court the Post Rape Form PMFI – 2a and the P3 form PMFI – 2(b). Later PW1 was informed that the appellant was arrested on the 7<sup>th</sup> which information they received from PW2 who called her mum and informed her. She went and confirmed that the appellant was the culprit. She also told the trial Court that she washed her clothes in ignorance. She also testified that the appellant took her purse and returned it while she was at PW2’s home on the day of the incident on the 5/2/2009. She denied ever getting into any agreement of love with the appellant or even asking him for money. She was cross examined by the appellant and she stood her ground and reiterated her statement. She maintained that the appellant defiled her three times after threatening her with death should she scream.

17. PW2 Andrew Khamusini Kujani, the village elder of Imambo village, Mukango sub location in Shinyalu corroborated PW1’s testimony when he found her at his home at about 4.00pm on 05/02/2009 crying. After PW1 narrated her ordeal to him he contacted PW1’s parents who came for her on 06/02/2009. It was PW2’s testimony. That the appellant had chased away his (appellant’s) wife and that

the appellant was generally of bad character. PW2 also told the Court that PW1 denied the appellant's allegation that she had agreed to have sex with the appellant in return for KShs.500/= (Five hundred only).

18. PW3 was Maurice Otunga Chitiya the Assistant Chief of Mukango sub location. After receiving the report of the incident from PW2, PW3 went about looking for the appellant and found him at Shinyalu market. He arrested the appellant and took him to the AP camp. PW3 confirmed that PW1 had already made a report to the A.P camp.

19. On cross examination by the appellant he explained that the complainant identified the appellant at the AP camp. PW4 Francis Wasike a clinical officer from Kakamega Provincial General Hospital examined the complainant and also produced the P3 form which he had filled. He testified that he treated the complainant on the 6.2.09. He assessed her age to be 17 years and found that she had pains in the waist and stomach, swelling on the vulva and discharge from vagina. HVS revealed presence of sperms and bacteria. HI.V. was negative and the pregnancy test was also negative. He signed the P3 form which he produced as an exhibit. The same was marked as "PExhibit 2b".

20. He also filed the post rape care form which he produced as Pexhibit 2(a). He confirmed that complainant was defiled. He re affirmed his statement on cross examination. The Prosecution closed its case and the trial Court found that the Prosecution had established a prima facie case against the appellant and he was placed on his defence.

### **The Defence Case**

21. The appellant gave a sworn statement and did not call any witness. He told the trial Court that he knew the charges against him and he heard the evidence of the Prosecution witnesses. He explained how he was arrested on the 7/2/2009 at a hotel while taking breakfast by one of the village elders and later brought to Court. He claimed that he knew nothing about the charges before him.

22. On cross examination by the Prosecutor he claimed that the Assistant Chief had framed the charges against him because he refused to sell his shamba. He also claimed that he didn't know the complainant.

### **Issues for Determination**

23. This Court has evaluated all the evidence afresh and analyzed the same and also keenly considered the submissions by the parties. The issues to be considered for determination are:-

- a. whether evidence on record was uncorroborated and lacked probative value and was insufficient to warrant a conviction.
- b. whether failure to produce exhibits for example blood stained clothes, birth certificate and failure by the complainant to raise alarm at the time of the alleged offence was fatal to the Prosecution's case.
- c. whether the trial Court rejected the appellants defence and convicted him on the basis of his character.
- d. whether failure to produce a DNA test and/or examine the appellant was fatal to the Prosecution's case.
- e. Whether the appellants rights as enshrined in Article 49 (1) (a) of the Constitution were infringed and whether it was fatal to the Prosecution case for the Investigating Officer not to testify.

24. On the first issue this Court is aware. This case involves a Sexual Offence involving a minor and that corroboration is not necessary. The law is clear under the proviso to Section 124 of the Evidence Act, which creates an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence of a child of tender years. In **Jacob Odhiambo Omumbo –vs- Republic Cr.**

**Appeal No.80 of 2008** (Kisumu) the Court of Appeal on the same point stated as follows:-

“Though Ps evidence was that of a child of tender years the Court can convict on it by virtue of the proviso to Section 124 of the Evidence Act Cap 80 Laws of Kenya as amended by Act No.5 of 2003”

In **Mohammed –vs- Republic [2006] 2 KLR 138** the Court asserted “it is now settled that Courts shall no longer be harmstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is telling the truth.”

25. In this particular case the complainant was aged seventeen (17) years. At page 17, I do not think that it was necessary to do a *voire dire* examination. Her evidence was confirmed by that of PW2 and PW3. There was no need for corroboration since she was of tender years. Going by the provisions of Section 124 of the Evidence Act therefore the trial Court was entitled to convict the appellant on the evidence of the complainant. For the above reasons, I find the appellants complaint unwarranted.

26. On the second issue this Court finds that there was no need to produce blood stained clothing or even the birth certificate of the complainant. In defilement cases what the Prosecution has to prove is whether there was penetration of a minor. To prove penetration Prosecution must show that the victim was examined by a doctor or clinical officer who ascertained that there was defilement. In this case the clinical officer PW4 examined the complainant and concluded that she had been defiled. He produced the Post Rape Care form and the P3 form that was enough proof of defilement. The P3 form contains or shows the age of the complainant who also told the trial Court her age and even produced a baptismal card to that effect. The issues by the appellant on the stamping of the said document are neither here nor there. The appellant also submitted that the complainant did not raise any alarm to attract witnesses who would have been called to testify. It is not lost to this Court that the complainant was new in that environment and the appellant had in fact threatened her. She only screamed once. But because of the threats she kept quiet and waited for an opportune time to escape. This argument by the appellant cannot hold any water.

27. Thirdly this Court finds that the trial Court did consider the appellants defence before making a finding of guilty and convicting him. The issue of D.N.A as raised by the appellant also cannot stand because the evidence was clear and it linked the appellant to the offence herein. The act of defilement had been ascertained. The offence took place in broad daylight and the complainant gave details of the appellant which led to his arrest.

28. Finally, the appellants rights as enshrined in Article 49 (1) (a) were not infringed as alleged. First of all, he was told the charges against him by the elders PW2 and PW3 who arrested him. This Court finds that it was not fatal for the Prosecution not to have called the Investigating officer as the main witness in this case was the complainant. The issue of the appellant’s character also cannot arise because as stated above the evidence was overwhelming and was not shaken by the appellant.

29. For the above stated reasons, the appellants appeal has no merit. I uphold both conviction and sentence. The appeal is dismissed. Right of Appeal 14 days.

30. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 4<sup>th</sup> day of February 2016.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Present in person for Appellant

Mr. Omwenga (present) for Respondent

Mr. Lagat - Court Assistant