



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 174 OF 2013**

**DANIEL MUSYOKA MWENGA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Appeal from the Judgment in Kyuso Principal Magistrates Criminal case No. 08 of 2013 delivered on 7/11/2013 E. M. Mutunga RM)***

**JUDGMENT**

The appellant was charged in the subordinate court with defilement contrary to section 8(1)(4) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 7<sup>th</sup> January, 2013 at [particulars withheld] in Tseikuru District of Kitui County, intentionally caused his penis to penetrate the vagina of NMM a child aged 16 years.

In the alternative, he was charged with indecent act with a child contrary to Section 11(1) of the same Act. The particulars of offence were that in the same day and place intentionally touched the vagina of NMM a child aged 16 years with his penis.

He denied both charges. After a full trial, he was convicted on the main count and sentenced to serve twenty one (21) years imprisonment. Dissatisfied with the decision of the trial court, he has appealed to this court against both conviction and sentence.

His initial petition of appeal was filed in November, 2013. Before the appeal was heard, however, the appellant filed a fresh petition of appeal, as well as written submissions with leave of court. He relied on his later petition of appeal.

The grounds of appeal are in summary that the charge was defective as the particulars did not state the alleged offence and the time of its commission; that the doctor's P3 form did not support the charge; that the prosecution evidence was contradictory; that his mode of arrest was improper and suspect; that the statement of the victim did not support the defilement allegation; that important witnesses who were members of the complainant's family were not called to testify; that the charge was a frame up; and lastly, that the sentence was harsh and excessive.

At the hearing of the appeal, the appellant relied upon the written submissions filed and chose not to make oral submissions. I have perused and considered the appellants written submissions.

The learned Prosecution Counsel Mr. Orwa opposed the appeal. Counsel highlighted the three

ingredients to be proved in defilement cases, firstly, the age of the complainant, secondly, whether there was penetration, and thirdly, whether the appellant was the culprit. Counsel submitted that the trial court directed its mind to all the three ingredients and came to the conclusion that the appellant had committed the offence.

On the charge sheet, counsel submitted that as the age of the complainant was assessed on 12/06/2013 and the alleged defilement had occurred on 7/01/2013, it followed that the complainant was aged 14 years and 7 months when the offence occurred. In counsel's view therefore, the charge should have cited section 8(1) (3) instead of section 8(1) (4) of the Act. However, counsel contended that the apparent defect was minor and curable under section 382 of the Criminal Procedure Code (Cap 75).

With regard to ground 6 of appeal, counsel submitted that there were no contradictions in the evidence of prosecution witnesses. Counsel also submitted that there was sufficient corroboration of the evidence of prosecution witnesses.

With regard to ground 7 of appeal, counsel submitted that the appellant had not demonstrated or stated the constitutional rights which had been violated against him.

On ground 8, counsel submitted that the evidence of PW1 the complainant supported the charge.

With regard to ground 9, counsel argued that calling additional witnesses would only be useful in them repeating what had already been said by other witnesses. In addition, none of the additional witnesses was an eye witness.

On ground 10, the learned counsel argued that once the correct section of the offence was considered, then the applicable sentence would be imprisonment for a period of not less than 20 years. As such therefore, the sentence of 21 years imposed by the trial court was lawful and appropriate.

With regard to ground 11, counsel submitted that the appellant had not demonstrated that the charge was a frame up, in that he had not alleged any political or tribal animosity. These were the submissions of the State.

In summary, the prosecution called five (5) witnesses in the cases. PW1 was the complainant NMM who said she was aged 17 years at the time of testimony on 15/05/2013. It was her evidence that on 7/01/2013 at around 8 pm, she was accosted by the appellant, who asked where her mother was. She told him that she had gone to Tseikuru. The appellant then, while holding a machete pulled her to a nearby bush, removed her clothes and threatened to chop her head. He then laid her on the ground and had sexual intercourse with her. While in the act, the mother of the complainant PW2 Mungatu Muthui and the wife of the appellant found the two red handed in the bush.

The complainant was later taken for treatment. A P3 form was filled by PW 3 Jeremiah Kalola a gynaecologist. He based his findings on the treatment notes which indicated that the complainant had injuries on her knees. The hymen was broken. He conducted age assessment, and found that the complainant was aged 15 years 2 months as on 12/06/2013. The appellant was thus arrested and charged in court.

When put on his defence, the appellant chose to keep quiet. He had earlier on asked for the case to be transferred to another court and for the prosecution not to call PC Wachira as a witness, which was declined by the court.

Faced with the above evidence, the court found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The court thus convicted and sentenced him to serve twenty on (21) year imprisonment. There from arose this appeal.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record

and come to my own conclusions and inferences taking into account the fact that I did not see the witnesses testify to determine their demeanor and give due allowance for that fact. **See Okeno vs. Republic (1972) EA32.**

I have evaluated the evidence on record afresh. The incident occurred at night. It was about 8.00 pm. The conviction of the appellant is founded on the evidence of his identification at night. I have to start by appreciating that in cases where the circumstances for identification are not favorable, the court has to take great caution before convicting on such evidence of visual identification – **See Odhiambo vs. Republic (2002)1KLR 241.**

In my view, there was no possibility of mistaken identity herein. The complainant knew the appellant well before as an uncle. They talked before the appellant dragged her to the nearby bush to commit the offence. In my view, there was sufficient evidence on record on both visual and voice identification of the appellant by the complainant. In addition to the above, PW 2 the mother of the complainant also saw the appellant and the complainant in the bush near her home. It was her evidence that there was moonlight that night. Again PW 2 talked with the appellant who threatened her with a machete. In my view, therefore, the appellant was positively identified as the person who was with the complainant that night.

Was there penetration? This is an important ingredient of an offence of defilement. The evidence tendered in court is that the hymen of the complainant was broken. Though there was no direct evidence to connect appellant with the breaking of the hymen of the complainant, the said broken hymen is consistent with sexual intercourse. Taking into account that the appellant was found by PW2 in the very act of lying on top of the complainant that night, in my view, it was proved that the appellant penetrated the vagina of the complainant.

In defilement cases, the age of the complainant is an important ingredient. This is the 3<sup>rd</sup> ingredient to be proved by the prosecution as correctly submitted by the Prosecuting Counsel. In the present case on 12/06/2013, the Medical Officer PW3 who testified in evidence assessed the age of the complainant. He merely relied on information given to him on the date of birth. In my view, that was not a scientific way of assessing age.

In addition, no evidence was tendered on how the medical officer came to know of the exact date of birth of the complainant. What was the source of that information? This was not answered in the evidence on record, and the issue was left to imagination.

Besides, I note that the date “APRIL” in the age assessment report dated 12/06/2013 was written in a clean manner. However the year 1998” was clearly overwritten on an original number, which appears to have been erased. Added to this, is the fact that the trial court did not treat the complainant as a minor. She was made to tender evidence straight away on swearing. She also stated that she was 17 years on the day of the tendering evidence which was 15/05/2013, while the incident had occurred on 7/01/2013, just four months earlier.

Clearly in my view, the age of the victim could not be said to have been established by evidence in view of these conflicting facts. In my view, the age of the victim was not established. I am of the view that the victim was an adult above 18 years. The 3<sup>rd</sup> necessary ingredient for the offence of defilement was thus not proved by the prosecution.

The facts however prove the offence of rape. The appellant forcefully had sexual intercourse with the complainant. He threatened her with a machete. That amounted to rape as I have found that the complainant was an adult. In quashing the conviction for defilement, I thus substitute a conviction for rape, since all the ingredients of the offence of rape were proved. The appellant is guilty of rape. I will also set aside the sentence imposed by the trial court and substitute an appropriate sentence for the offence of rape.

Consequently, I quash the conviction of the learned trial Magistrate and set aside the sentence imposed. I

substitute thereon a conviction for rape contrary to section 3(1) (3) of the Sexual Offences Act. I sentence the appellant to serve ten (10) years imprisonment from the date on which he was sentenced by the trial court. Right of appeal explained.

**Dated and delivered at Garissa this 5<sup>th</sup> day of February, 2015**

**GEORGE DULU**

**Judge**

**In the presence of Appellant in person**

**Mr. Orwa for state**

**Martin court clerk**