



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 71 OF 2013

MESHACK WANGILA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against Judgment conviction and sentence of Hon. J.M. Nang'ea, Senior Principal Magistrate at Kitale delivered on 10/6/2013 vide Kitale CMCR. No. 929 of 2010)

J U D G M E N T

1. The appellant, **Meshack Wangila**, was charged with defilement contrary to Section 8(1) read with Section 8(2) of the Sexual Offences Act, in that on the 25th March, 2010, at [particulars withheld] in Trans-Nzoia West District, defiled **FBS**, a child aged **ten (10) years**.
2. After trial before the Senior Principal Magistrate at Kitale, the appellant was convicted and sentenced to life imprisonment. He was aggrieved and preferred this appeal on the basis of the grounds in the Amended Petition of Appeal filed herein on 18th May, 2015 by the Firm of **R.E. Nyamu & Co. Advocates**.
3. At the hearing of the appeal, the appellant was represented by learned counsel, **Mr. Nyamu** who submitted that the case was handled by two magistrates but when the second magistrate took over, there was non-compliance with the provisions of Section 200 of the Criminal Procedure Code.
4. That, the said provisions was not brought to the attention of and explained to the appellant as is mandatorily required. In that regard reliance was placed on two decisions i.e. **Rebecca Mwikali Nabutola -vs- Republici [2012] eKLR** and **Charles Kuria Macharia -vs- Republic (2013) eKLR**.
5. The appellant through learned counsel further submitted that the complainant indicated in her evidence that she was in the company of another child but that other child was not called to testify. That, the evidence of PW1 and PW3 was contradictory in that, whereas PW1 talked of seeing sperms on the complainant's trousers, PW3 talked of something resembling semen but was not semen.
6. That, although PW1 said that the act occurred in the appellant's sister's house where she was present, she did not see the complainant enter the house. That, her evidence (PW1) and that of the complainant was also contradictory in that, she said that the minor had sugarcane and bananas which she told her to take into the house yet the complainant said that the items were thrown away by her (PW1).
7. That, whereas PW1 said that she screamed but the appellant did not run away, the trial court formed an opinion that the appellant escaped on a motor-bike prior to being apprehended and handed to the police. That, several people were present at the scene but none of them was called to

- testify in court.
8. With regard to penetration, the appellant submitted that the fact was not established as the complainant only mentioned “Tabia Mbaya” and it was not known what those words meant to the complainant. That, “ Tabia Mbaya” only means bad-manners and not penetration and more ought to have been done to bring the words towards the act of penetration. In that regard, the decision in ***Simon Rokoo -vs- Republic High Court Criminal Appeal No. 55 of 2012 at Eldoret***, was cited.
 9. That, PW3 was categorical that the hymen was broken but did not indicate whether it was old looking or fresh. That, such indication was necessary.

The appellant went on to submit that the clinical notes were not explained by the clinical officer for validation of the P3 form thereby making it difficult to tell whether the contents of the P3 form emanated from the treatment notes.

10. With regard to the judgment of the trial court, the appellant submitted that there was a conflict of the names used by the complainant and that the clinical officer just mentioned the complainant without identifying her in relation to the treatment notes and the P3 form. That, the hymen would be fresh if it was broken by fresh penetration since there would be bleeding.
11. That, the clinical officer said that there was no bleeding nor spermatozoa and since the appellant was himself not examined it could not be determined that the fluid in the complainant came from him. That, apart from the appellant being examined, there was no repeat of the test carried out on the complainant recommended by PW3.
12. The appellant submitted that PW4 did not deal with the matter from the start but purportedly produced exhibits said to belong to the complainant, but which were not identified by the appellant and PW1. That, the trial court made a wrong assumption that the appellant was a defiler yet there is no room for assumption and speculation in Criminal Law as was held in the case of ***Kaingu Elias Kasono -vs- Republic Criminal Appeal No. 504 of 2010 at Malindi (C/A)***.
13. It was the appellant's submission that in this case there was neither direct nor circumstantial evidence to implicate him with the offence. In that regard, the case of ***Bukenya -vs- Uganda (1972)EA 549***, was relied upon. The appellant contended that it was fatal for the prosecution to fail to call the person who arrested him. That, since the magnitude of the sentence imposed upon him is so high, the prosecution was required to adduce sufficient evidence to prove the offence. That, his defence was dismissed without good reasons. He urged this court to allow the appeal.
14. In opposing the appeal, the respondent through learned prosecution counsel, **Mr. Kakoi**, submitted that Section 200 (3) of the C.P.C. was duly complied by the court as shown on page 26 of the supplementary record of appeal. That, the appellant was legally represented and he agreed that the hearing of the case could proceed from where it stopped.
15. That, the prosecution evidence was proper and did establish the offence as the complainant's mother (PW1) testified on how she saw her daughter's trousers stripped and the complainant clearly explained to the court on what the appellant did to her. That, there was no doubt as to what happened since the clinical officer confirmed penetration and the breaking of the hymen thereby proving the offence.
16. Learned prosecution counsel, referred to the case of Simon Rokoo (supra) and said that it was irrelevant as the hymen was therein intact. That, the occurrence of the offence was clearly proved by the complainant, PW1 and PW3 and therefore the story of the bananas and sugarcane was irrelevant. That, the absence of spermatozoa did not water down the fact of defilement since the presence of spermatozoa or blood are not essential ingredients of the offence.
17. It was further submitted by the respondent that the suggestion made for a second test on the complainant was in relation to venereal diseases and not the fact of defilement. That, the prosecution was at liberty to call any number of witnesses and therefore, it was unnecessary to call the child allegedly in the company of the complainant. That the investigation officer is not an important witness since in such cases the complainant and the doctor are the key witnesses. That the role of the investigation officer is merely to collect and correlate evidence.

The respondent therefore urged the court to dismiss the appeal.

18. Having considered the rival submissions in the light of the grounds of appeal, the duty of this

- court was to re-visit the evidence and arrive at its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.
19. In summary, the prosecution case was that at the material time, the child complainant **F B**, who was actually **PW2**, was according to her mother, **L N M (PW1)**, aged five and a half (5 ½) years. She testified when she was 6 ½ years. A copy of her immunization card (P. Exhibit 1) indicated that she was born on 25th May, 2004.
 20. On the material date at about 10.00 am she (PW2) was playing outside their house with other children when her mother (PW1) who was sitting around there dozed off for some minutes only to later see the complainant emanating from the appellant's sister's house. The appellant and the sister were her neighbours.
 21. She (PW1) noted that the complainant was carrying sugarcane and two pieces of bananas. She observed the complainant, and noted that her long trouser was wet. On inquiring, she was told by the complainant that the appellant had removed her underpants and did to her "Tabia Mbaya". The complainant confirmed as much.
 22. The complainant's mother (PW1) confronted the appellant who stood at a door step trembling. His long trouser was wet. He jumped onto a motor bike and attempted to escape but was pursued and apprehended. She (PW1) took the complainant to Kitale District Hospital and thereafter reported the matter to the police.
 23. **Chrisandos Masinde (PW3)**, a clinical officer at Kitale District Hospital examined the complainant one day after the incident. He noted that she had a broken hymen with a discharge resembling semen. She also had bruises on the labia minora. He concluded that the complainant had been defiled and completed the necessary P3 Form which he signed (P. Exhibit 4)
 24. **P.C. Wanjiru Kiruri (PW4)**, took over the investigation of the case from a colleague who was transferred. She perused the necessary file which revealed that the complainant was reportedly defiled. She produced the victim's birth records and material clothes (P. Exhibit 1, 2 and 3) which had already been obtained. She confirmed that the appellant was arrested on the same day of the incident.
 25. The defence case was that the appellant was living with his sister called Nancy at Lessos having visited her from Kimilili where he is a spare parts dealer. He gave the children in the homestead sugarcane. They were with the neighbourhood children. He left the complainant's mother house only to return later to find her (complainant's mother (PW1) crying. Area residents gathered at the scene and she told them that he had defiled her daughter. He denied the allegations.
 26. The appellant contended that the allegation against him was malicious as the complainant's mother had been borrowing money from him and owed him Kshs.1,500/=. That, she falsely accused him when he refused to advance more money to her. He was arrested by area residents as he fled for help.
 27. **David Isabwa Shamama (DW1)**, a welder in Kitale and a brother in-law of the appellant confirmed that the appellant lived with him for three (3) months and had complained to him that the complainant's mother was fond of borrowing money from him. Later, she (complainant's mother) accused the appellant of defiling her daughter and he was later charged with the present offence.
 28. After considering the entire evidence in its totality, the learned trial magistrate concluded that the charge had been proved against the appellant beyond any reasonable doubt. In so doing, the learned trial magistrate found that the fact of defilement hence penetration was undisputed and that the evidence of the complainant to the effect that the appellant was the offender was credible.
 29. The learned trial magistrate considered the defence raised by the appellant and disbelieved it. His view was that the allegation by the appellant that the charge was actuated by malice was clearly an afterthought.
 30. This court having reviewed the evidence also notes that the fact that the complainant was defiled was not disputed at all. The appellant main defence was that he was not the person responsible for the offence and was maliciously implicated by the complainant's mother. There was sufficient and credible evidence from the complainant (PW2) and the clinical officer (PW3) which proved that the offence was committed.
 31. Under the Sexual Offences Act, penetration means the partial or complete insertion of the genital organs of a person into the general organs of another person. The evidence by the complainant proved that her genital organs were penetrated into by a male genital organ. This was adequately

- corroborated by the material evidence availed by the clinical officer (PW3). The presence or absence of spermatozoa or seminal fluid in the genital organs of a victim is not a factor in establishing penetration.
32. The complainant clearly implied that she was defiled when she mentioned the words “Tabia Mbaya”. It is common for minors appearing in our courts to use such words to indicate that they were sexually assaulted or to put it aptly defiled. This court may therefore take judicial notice that to minors in cases such as the present one the words “Tabia Mbaya” means nothing short of defilement especially where penetration is established.
 33. In the **Simon Rokoo case (Supra)**, the words “Tabia Mbaya” was not construed to mean defilement because there was no penetration. The court therefore found it difficult to attach the words “Tabia Mbaya” to defilement and thus held that the appellant was wrongly convicted for a charge of attempted defilement.
 34. In any event and with all due respect, this court notes that the decision in the **Rokoo Case** was made by a Judge of the Environment and Land Court which is a special court with the status of the High Court but without jurisdiction to deal with criminal matters as was recently held by the Court of Appeal in the case of **Karisa Chengo & Others -vs- Republic [2015] eKLR**.
 35. The evidence by the clinical officer (PW3) that the complainant on being examined was found to have a broken hymen was further proof that she was defiled. The “age” of the broken hymen was an irrelevant factor which could not be taken into account in disproving the act of defilement. It is instructive to note that a penetration could be complete even without breaking of the hymen.
 36. This court is in full agreement with the trial court that the act of defilement against the complainant was adequately and credibly established by relevant evidence adduced by the prosecution witnesses.

Therefore, the crucial point for determination was the appellant's, involvement in the offence or his identification as the offender.

37. It was without doubt that the appellant was a neighbour to the complainant's mother (PW1) who noted or suspected that there was something amiss when she saw the complainant leaving the appellant's house and observed that her trousers were wet. The complainant confirmed to her that she had been defiled by the appellant. Shortly thereafter, she (PW1) confronted the appellant and questioned him. She noted that his long trouser was also wet and that he was trembling. He made an attempt to escape but in vain.
38. The appellant alleged that he was maliciously implicated by the complainant's mother but there was no scintilla of evidence establishing the fact. The evidence by the defence witness (DW2) was simply insufficient to establish malice whether considered on its own or together with that of the appellant. This court agrees with the finding by the learned trial magistrate that the claim that the appellant was maliciously implicated was an afterthought and also finds that the appellant was the person responsible for defiling the complainant. His conviction by the learned trial magistrate was therefore safe and sound.
39. As regards the sentence, the complainant was below the age of eleven (11) years at the time of the offence and therefore the sentence of life imprisonment meted out against the appellant was lawful and in accordance with Section 8(2) of the Sexual Offences Act.
40. The appellant submitted that Section 200 of the C.P.C. was not complied with when the matter was taken over by a second trial magistrate. However, the trial court's original record clearly shows that when the trial resumes before a second magistrate (**Hon. J.N. Nang'ea**) on 20th April, 2012, after the transfer of the first magistrate (**Hon. D.M. Ochenja**), the Provisions of Section 200 (3) of the Criminal Procedure Code were complied with whereupon the appellant confirmed that he wished to have the trial continue from where it last reached. He did not indicate to the court that he needed to have any witness re-summoned and reheard.
41. It was sufficient that the incoming magistrate indicated that Section 200(3) had been complied with. He did not have to record what he meant by that.

Contrary to what learned counsel for the appellant indicated herein, it was not the prosecution who indicated that Section 200 C.P.C had been complied with. The indication came from the learned trial magistrate thereby showing clearly that the appellant's right under the provision was

explained to him.

42. In sum, this appeal is devoid of merit and is therefore dismissed in its entirety.

J.R. KARANJA

JUDGE

4/6/2015

[Delivered and signed this **4th** day of **June, 2015**].