



**CWK v Republic (Criminal Appeal 72 of 2013)
[2015] KEHC 7553 (KLR) (Crim) (10 July 2015) (Judgment)**

C.W.K v Republic [2015] eKLR

Neutral citation: [2015] KEHC 7553 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL 72 OF 2013

LK KIMARU, J

JULY 10, 2015

BETWEEN

CWK APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal arising out of the conviction and sentence of Hon. Ochenja – AG.CM
delivered on 23rd April, 2013 in Kibera CM. CR. Case No.1327 of 2009)*

Elements required to sustain a charge of defilement

The appellant was charged and convicted with the offence of defilement. The court highlighted the elements required to sustain a charge of defilement.

Reported by Kakai Toili

***Criminal Law** – sexual offences – defilement - what were the elements required to sustain a charge of defilement - Sexual Offences Act (cap 63A), section 8(2).*

Brief facts

The appellant was charged with the offence of defilement of a child aged 10 years. In the alternative, the appellant was charged with committing an indecent act with the child. The trial court convicted the appellant on the main charge of defilement. He was sentenced to serve life imprisonment. The appellant was aggrieved by his conviction and sentence and thus filed the instant appeal.

The appellant contended that the prosecution had not established the age of the complainant. He faulted the trial court for failing to take into consideration the fact that two expert witnesses had adduced contradictory medical evidence, which taken in totality, did not support the charge. In the premises therefore, the appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.



Issues

What were the elements required to sustain a charge of defilement?

Held

1. Being a first appeal, it was the duty of the court to reconsider and re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the appellant.
2. For the prosecution to sustain the charge of defilement, there were three elements that the prosecution must establish. The first element was penetration. The prosecution established penetration. The medical evidence corroborated the evidence that was adduced by the complainant. What may appear as contradiction in the two medical reports could actually be explained. Therefore, penetration was established to the required standard of proof beyond any reasonable doubt.
3. The second element to sustain the charge of defilement was the perpetrator of the offence. The identity of the perpetrator was not in doubt because the complainant had lived with the appellant for a period of four years before the sexual assault. In fact, the complainant considered the appellant her father. PW2 corroborated the complainant in regard to the testimony of identification. It was the appellant who sexually assaulted the complainant. The appellant's alibi defence was displaced by the evidence adduced by the prosecution witnesses which proved that he was resident in the house where the complainant was sexually assaulted.
4. The third element to sustain the charge of defilement was the age of the victim. It was imperative that the prosecution established the age of the complainant. That was material because the age of the complainant in defilement cases determined the custodial sentence that shall be meted on the appellant. The complainant was aged at least 11 years at the time of the sexual assault. That conclusion had been reached after the court considered the testimony of the complainant herself and the report of the Children's Department which was produced into evidence and which was part of the court record.
5. Where the prosecution failed to establish the age of the victim, then it would be upto the court to assess the age of the victim for the purposes of sentencing the convicted perpetrator.
6. The prosecution established to the required standard of proof that indeed the appellant sexually assaulted the complainant. The custodial sentence meted on the appellant was legal. Under section 8(2) of the Sexual Offences Act, any persons who committed an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to life imprisonment. The appellant was sentenced to serve life imprisonment. That was as it should be.

Appeal dismissed.

Citations

Cases

Kenya

1. *Mwakavi, Musyoki v Republic* Criminal Appeal 172 of 2012; [2014] KEHC 5681 (KLR) - (Explained)
2. *Mwareng, Dominic Kibet v Republic* Criminal Appeal 155 of 2011; [2013] KEHC 1353 (KLR) - (Explained)
3. *Njoroge, Gabriel Kamau v Republic* Criminal Appeal 149 of 1986; [1987] KECA 4 (KLR) - (Applied)
4. *Wagner, John Cardon v Republic* Criminal Appeal 405 & 406 of 2009; [2011] KEHC 3272 (KLR) - (Explained)

Statutes

Kenya

1. Criminal Procedure Code (cap 75) section 358 — (Interpreted)
2. Sexual Offences Act (cap 63A) sections 8(1)(2); 11(1) — (Interpreted)



Advocates

Mr Ongoya for the appellant

Ms Kimiri for the respondent

JUDGMENT

1. the appellant, CWK was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on March 14, 2009 at [particulars withheld] in Nairobi County, the appellant committed a sexual act by inserting his genital male organ (penis) which caused penetration into the female genital organ (vagina) of MM, a child aged 10 years. In the alternative, the appellant was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place, the appellant committed an indecent act by touching the female genital organ of MM, a child aged 10 years. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the appellant was convicted on the main charge of defilement. He was sentenced to serve life imprisonment. the appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.
2. In his petition of appeal, the appellant raised five (5) grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted yet the prosecution had not established the age of the complainant. He faulted the trial magistrate for failing to take into consideration the fact that two expert witnesses (PW3 and PW4) had adduced contradictory medical evidence, which taken in totality, did not support the charge. the appellant was aggrieved that the trial court had relied on the evidence of Dr Muhombe who was not present in court and failed to take into consideration the evidence of Dr Kamau who had testified in court. the appellant took issue with the trial magistrate's failure to consider the failure by the prosecution to call crucial witnesses in the case. In his view, this prejudiced his case. the appellant was aggrieved that the trial magistrate had failed to take into consideration his alibi defence. In the premises therefore, the appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.
3. During the hearing of the appeal, this court heard oral rival submission made by Mr Ongoya for the appellant and by Ms Kimiri for the State. Mr Ongoya submitted that the age of the complainant was not established during the hearing of the case. He argued that in defilement cases, the age of the complainant is an important factor especially when sentence is being considered. He relied on the case of *Dominic Kibet Mwareng v Republic* [2013] eKLR where Ndolo J held thus:

“The critical ingredients forming the offence of defilement are: the age of the complainant, proof of penetration and positive identification of the assailant. Mr Chebii, counsel for the appellant submitted that none of these ingredients was established. On the age of the complainant, he submitted that failure to conduct an age assessment on the complainant was fatal to the complainant's case. He referred the court to the case of *Hilary Nyongesa vs Republic* (Eldoret Criminal Appeal No 123 of 2009) where Mwilu J (as she then was) stated that:

“Age is such a critical aspect in Sexual Offences that it has to be conclusively proved...And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim.”



I agree and add that while the court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the Prosecution and a simple statement by the complainant as to their age does not in my view, constitute such proof.”

4. He further submitted that failure by the prosecution to prove the age of the complainant meant that an important ingredient of the charge had not been proved. As regard medical evidence, he submitted that the evidence adduced by the two doctors was contradictory. PW4 Dr Adan Pilwan produced a medical report on behalf of Dr Muhombe which indicated that there was laceration in the vaginal area. In his view, this was hearsay evidence because Dr Muhombe was not in court to be cross-examined on her evidence. Dr Kamau (PW3), gave direct evidence which contradicted the evidence adduced by PW4. His evidence was to the effect that there was an old hymen tear. There was no injury in the vagina. He urged the court to put more weight on the evidence that was adduced by Dr Kamau, because it was direct evidence. He took issue with the fact that the prosecution had failed to call crucial witnesses to testify on the case. He stated that a T-shirt which was allegedly used by the appellant during the alleged sexual assault was taken to the government chemist for analysis. That T-shirt was not produced into evidence. Neither was the government chemist called to testify in the case. In his view, this was a critical witness who ought to have been called to testify in the case. He urged the court to draw an adverse inference on failure by the prosecution to call this critical witness. He further submitted that the alibi defence adduced by the appellant was not displaced by the prosecution. In the premises therefore, he urged the court to find that the conviction of the appellant was unsafe as a consequence of which the appeal should be allowed.
5. Ms Kimiri for the State opposed the appeal. She conceded that the age of the complainant was critical in defilement cases. However, she submitted that the prosecution had established to the required standard of proof the age of the complainant. She stated that the complainant testified that she was ten (10) years. The trial court had no reason to doubt her testimony. The testimony was corroborated by the P3 form which was produced which indicated the age of the complainant to be ten (10) years. She conceded that no documentary evidence was adduced to support her age. She was of the opinion that if the court was of the view that the age of the complainant should be ascertained, it can exercise its jurisdiction under section 358 of the *Criminal Procedure Code* and order for the child to be taken for age assessment. She submitted that, in so far as conviction was concerned, the age of the complainant was not critical. It was limited to sentencing.
6. As regard medical evidence, she submitted that there was no material difference between the medical reports of Dr Muhombe and Dr Kamau. The complainant was seen by Dr Muhombe immediately after the incident while Dr Kamau saw the complainant sometimes later. Both medical reports were consistent that indeed the complainant had been defiled. Both medical reports were admitted into evidence without any objection by the appellant. She urged the court to disregard the contention by the appellant that there was contradiction in the particular medical reports.
7. As regard whether all necessary witnesses were called, Ms. Kimiri conceded that indeed the government analyst did not testify in the case. However, she insisted that the evidence adduced by the witnesses who were called established the charge to the required standard of proof beyond any reasonable doubt. As regard the alibi defence proffered by the appellant, learned counsel submitted that the testimony of PW2, the aunt of the complainant, placed the appellant in the house where the complainant slept on the material night she was defiled. The alibi defence was therefore displaced by prosecution’s witnesses. She urged the court to dismiss the appeal.



8. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. As was held by the court of Appeal in *Njoroge -vs- Republic* [1987] KLR 19 at P 22:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of the first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see *Pandya v R* [1957] EA 336, *Ruwalla v R* [1957] EA 570)”

9. In the present appeal, it was the prosecution’s case that on March 14, 2009, the appellant sexually assaulted the complainant. PW2 MM, the aunt of the complainant testified that the appellant was her husband of ten (10) years. They had been blessed with two children. They lived with the complainant who was the daughter of her late brother. Prior to the incident, they had lived with the complainant for a period of four years. The complainant was attending school. She was a standard two pupil. On the material night at about 9.30 PM, PW2 attended a funeral wake in the neighbourhood. Her brother had died. She left the appellant with the complainant and two other children. The complainant testified that at about 11.00 PM. when she was asleep on the seat where she usually slept, the appellant carried her from the said seat to his bed. The lights had been switched on. She was able to clearly see the appellant. the appellant removed her trouser and pants. He then removed his clothes and inserted his penis into her vagina. He had sexual intercourse with her.
10. At 6.00 AM, he instructed her to take bath and change her clothes. She took bath inside the house. Normally, she bathed in the bathroom outside the house. She testified that she could not move out of the house because she felt pain in her vagina. By that time, the appellant had left the house and gone to work. When PW2 arrived home on the following day, she told her that she had been sexually assaulted by the appellant. She was taken by PW2 to Kangemi Bora Afya Clinic where she was referred to Hurlingham Nairobi Women Hospital. The complainant was treated and discharged. According to the medical report produced by PW4 Dr Adam Pilwan on behalf of Dr. Muhombe (she was unwell at the time), Dr Muhombe, noted that there was bruising at introitus, the hymen was freshly torn with multiple tears. There was whitish discharge. She treated the complainant. She formed the opinion that the complainant had indeed been sexually assaulted. When the complainant was seen by Dr Kamau ten days later, he noted that the complainant had an old hymenal tear. It was on the basis of this evidence that the appellant was convicted.
11. For the prosecution to sustain the charge of defilement, there are three elements that the prosecution must establish. The first element is penetration. In the present appeal, the complainant testified that on the material night of March 14, 2009, the appellant removed her from where she usually slept and transferred her to his bed where he sexually assaulted her. She described how the appellant removed her trouser and pant before he penetrated her. The complainant testified that the appellant did this when PW2, his wife was absent. PW2 testified that on the material night she had attended a funeral wake for his late brother. On the following day, the complainant informed PW2 what had transpired. The complainant was taken to Nairobi Women Hospital where medical examination confirmed that indeed the complainant had been sexually assaulted.
12. the appellant took issue with the medical evidence that was adduced by the two doctors. the appellant is of the view that the two medical reports produced in evidence were contradictory and did not



corroborate the testimony of the complainant that she had been sexually assaulted. On re-evaluation of this evidence, this court is of the view that indeed the prosecution established penetration. The medical evidence corroborated the evidence that was adduced by the complainant. What may appear as contradiction in the two medical reports can actually be explained: The first medical report was filled less than twelve hours after the sexual assault. It clearly indicated that the complainant had injuries in her vagina consistent with a sexual assault committed a few hours earlier. As regard the second medical report, it confirmed that the complainant's hymen had been broken. There was no sign of injury in the vaginal area. This is because, at this time, the complainant had healed. This court therefore holds that penetration was established to the required standard of proof beyond any reasonable doubt.

13. The second element is the perpetrator of the offence. The complainant testified that it was the appellant who had sexually assaulted her on the particular night. There was no other adult male in the house. The identity of the perpetrator was not in doubt because the complainant had lived with the appellant for a period of four years before the sexual assault. Infact, the complainant considered the appellant her father. PW2 corroborated the complainant in regard to the testimony of identification. She testified that on the material night, she left the complainant with the appellant in the house. On the following day, the complainant told her that the appellant had sexually assaulted her. This court therefore holds that it was the appellant who sexually assaulted the complainant. the appellant's alibi defence was displaced by the evidence adduced by the prosecution witnesses which proved that he was resident in the house where the complainant was sexually assaulted.
14. The third element is the age of the victim. In the present appeal, the complainant testified that she was 10 years old at the time of the sexual assault. She was a standard two pupil at the time she testified in court. No documentary evidence was adduced to support her claim that she was ten years at the time she testified in court. This court agrees with the appellant that it was imperative that the prosecution establishes the age of the complainant. This is material because the age of the complainant in defilement cases determines the custodial sentence that shall be meted on the appellant. This court notes that in a case filed by the Children's Department against PW2 for neglecting the child, the age of the complainant was indicated as 11 years. The report was prepared in the same year that the appellant was charged. Ms. Kimiri concedes that evidence of the complainant's age did not come out clearly during the hearing of the case before the trial court. However in the present appeal, it was apparent that the complainant was at least 11 years of age. In *John Cardon Wagner v Republic* Nairobi High Court Criminal Appeal No 404 of 2009, Warsame J (as he then was) held that:

“In defilement cases, the age of the complainant is proved by either medical evidence or through other evidence since the *Sexual Offences Act* has different categories of ages and sentences of different ages...”
15. Mutende J in *Musyoki Mwakavi v Republic* Machakos HC Criminal Appeal No 172 of 2012 held that:

“...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense...”
16. In the present appeal, this court is persuaded that the complainant was aged at least 11 years at the time of the sexual assault. This conclusion has been reached after the court considered the testimony of the complainant herself and the report of the Children's Department which was produced into evidence and which is part of the court record. This court does not agree with the submission made of behalf of the appellant that where the prosecution fails to establish the age of the victim of a sexual assault, then such failure should result in the automatic acquittal of the perpetrator of the sexual assault. Where the prosecution fails to establish the age of the victim, then it will be upto the court to assess the age of the



victim for the purposes of sentencing the convicted perpetrator. the court must give the basis for the finding that it will make regarding the age of the victim. Enough said.

17. The upshot of the above reasons is that the appeal lodged by the appellant lacks merit and is hereby dismissed. The prosecution established to the required standard of proof that indeed the appellant sexually assaulted the complainant. The custodial sentence meted on the appellant is legal. Under section 8(2) of the *Sexual Offences Act*, any persons who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to life imprisonment. the appellant was sentenced to serve life imprisonment. That is as it should be. It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF JULY 2015

L. KIMARU

JUDGE

