



JOHN WACHIRA GATHERAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case No.1371 of 2010 of the Principal Magistrate's Court at Nyahururu, D. N. Musyoka, R. M.)

JUDGMENT

John Wachira Gathera, (*the appellant*) was charged and convicted of the offence of defilement contrary to section 8(1) and (3) of the Sexual Offences Act, 2006 (*No. 3 of 2006*) and sentenced to 20 years imprisonment. Aggrieved with both his conviction and sentence, the Appellant came to this court on appeal on the grounds, that the prosecution did not abide with the Constitution when they prosecuted him and essentially that there was no evidence to convict him of the offence of defilement.

Upon the hearing of the appeal the appellant substituted those grounds of appeal into new grounds:

- (1) that trial magistrate erred in law and fact in overlooking the fact there was no age assessment form to prove the age of the minor,***
- (2) that the trial magistrate erred in law and fact in relying on contradictory evidence to convict the appellant,***
- (3) that the trial magistrate erred in law and fact in overlooking the fact that no medical test was done upon the appellant in order to prove that he committed the offence,***
- (4) that the learned trial magistrate erred in law and fact in overlooking the fact that the essential witnesses were not produced by the persecution side,***
- (5) that learned trial magistrate erred in law and fact in failing to consider the appellant's unsworn defence,***
- (6) that the learned trial magistrate erred in law and fact in overlooking the fact that Section 34 of the Evidence Act, (Cap 80, Laws of Kenya) was contravened, that is, that the maker of the document was not called to produce the P3 Form.***

For those reasons the appellant prayed that his appeal be allowed, the conviction be quashed, the sentence be set aside, and that he be set free.

The appellant followed his amended Petition of appeal with well-argued written submissions which I will consider along with the submissions of Mr. Omwega learned Senior Principal State Counsel.

Section 8(1) and (3) of the Sexual Offences Act are in these terms:

- (1) *A person who commits an act which causes penetration with a child is guilty of an offence,*
- (2) *(inapplicable),*
- (3) *A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable – upon conviction to imprisonment for a term of not less than twenty years.*

The essential elements of the offence of a defilement and punishment under Section 8(1) and (3) of the Act are therefore these: -

- (a) *an act which causes penetration with a child;*
- (b) *the child defiled must be between twelve and fifteen years of age.*

Under section 2 the Act “*an act which causes penetration*”, means “*an act contemplated under this Act.*” The expression “*child*” has the same meaning assigned thereto under the Children Act, that is to say, any person under the age of eighteen years..

The question raised by the Appeal is whether the complainant was a child, as **firstly** no certificate of birth or assessment of age was produced, and **secondly** whether there was any evidence of penetration because, the applicant contends, he was not himself examined for such evidence.

In this regard therefore, I have examined the evidence adduced before the lower court, and in particular the evidence of PW1 (*the complainant*) PW2 (*the complainants companion*) and PW5, Dr. Waiti Kariuki who testified that the P3 Form was filled by his colleague Dr. Kamau. The appellant contended that that this vital witness was not called in evidence and that therefore the evidence of Dr. Waiti Kariuki (PW5) was not admissible with Section 34 of the Evidence Act (*Cap 80, Laws of Kenya*).

I think the appellant intended to refer to Section 33 and not Section 34 of the Evidence Act. Section 34 has no relevance to the appellant's case as that Section refers to admissibility of evidence given in previous proceedings. There was no evidence given in respect of any previous proceedings. PW5 gave evidence in place of Dr. Kamau because the Doctor who examined the complainant had gone on further studies and whose attendance could not be procured without an amount of delay or expenses which in the circumstances of the case appears to the court unreasonable as the Entry the P3 Form was made by Dr. Kamau in the discharge of his professional duty as a Doctor. The statement was consequently admissible. The contention by the Appellant that Section 33 of the Evidence Act was breached is untenable.

The entry by Dr. Kamau, in the P3 Form clearly, indicated that the victims “*vagina was inflamed, broken hymen, evidence of penetration.*”

Dr. Kamau, summarized PW1's evidence of the events leading to PW1's defilement. PW1 had been told to fetch water by a man who lives close to their house. While delivering water, she was forcibly put on the bed, her friend (PW2) was chased away. The man removed her inner garments and forced himself on her. He penetrated her after gagging her mouth with his hand. The Doctor described PW1 as -

“alert, in fair general condition, able to give history of events, coherent at the time of examination”

PW1, similarly, gave a coherent and detailed account of the circumstances leading to her defilement. The time was about 11.00 a.m. She had been sent by a neighbour Martha (PW3) to accompany her friend (PW2) to go and fetch water at Gathima. On their way back, they found the appellant, standing outside his door, asked them to take the water to him and then go back and draw water for the owner. PW1 took water to the appellant's house and poured it in his bucket.

The appellant then chased away Felista (PW2) and held PW1 by her hand and took her to his house, put her on his bed, removed her pants, removed his trousers, then removed his penis and entered into my vagina **“after finishing defiling me, he let me loose”**.

When cross-examination by the appellant, the victim (PW1) answered that he had gagged her mouth with his hand.

PW2 corroborated PW1's evidence that the appellant asked her to take the water to him, he chased her (PW2) away and held PW1 back, and did not of course know what the appellant did to Topista (PW1). Topista of course suffered as she was sought to rest every little while when going to fetch water again for PW3.

PW3 testified that after being informed by PW1 and PW2 of what had happened to PW1, reported to the Chief and eventually the Police.

The evidence of PW3 and PW4 was even more dramatic when they went to confront the appellant, they found **“the old man”** (the appellant) seated on a seat very drunk, having removed his penis outside and some sperms coming out and was challenged whether he could sleep with children. PW4 reiterated the same evidence.

PW6 arrested the appellant after receiving a report from PW3, PW4 and PW5 that appellant had defiled PW1. PW7, the Investing Officer reiterated the evidence of PW1 and PW2 as to how the appellant had defiled PW1.

I have already set out substantially the evidence of PW8, that PW1 was defiled.

When put to his defence, the appellant gave an unsworn statement which was two fold. **Firstly** that no one saw him commit the offence, and **secondly**, that even if he had committed the offence, the complainant, (PW1, and presumably her parents), had asked for compensation in the sum of Kshs 100,000/-. Later reduced to Kshs 50,000/- and then Kshs 40,000/- and that because he did not have such money the matter proceeded to hearing and he was convicted and sentenced to imprisonment. He asked the trial court **“to look at the evidence closely and see whether the claim of defilement was false or a true.”**

On appeal the appellant asked to speak in his mother tongue (*“Kikuyu”*) which was translated to the court by the court clerk, Mwai who understands and speaks the Agikuyu language. The appellant told this court that although he was convicted, he does not know what this case is about. He has a wife, and ten children, eight daughters all married, he has never assaulted any of them as children. He would not now at 55 years of age commit such an offence. He has been an elected Committee Member of the Local Primary School for last ten years, he has worked with children all that period. He once again pleaded with the court his conviction be quashed, the sentence set aside, and he be sent home a free man.

As well summarized by Mr. Omari, State Counsel, the offence was sufficiently proved and the trial court handed down the only sentence provided by law. The evidence was overwhelming, there were 8 witnesses and the evidence of PW1 and PW2 was critical.

PW1 explained how in the company of PW2 they had been instructed to fetch water from the river. On the way back as they were approaching the house of the appellant, he called them to take the water to his house.

The young girls aged 12 and 13 years obliged and took water to the appellants house. The appellant then chased PW2 away and held PW1 by the hand and took her to his house, held mouth (*gagged her*), undressed her and defiled her. The evidence was corroborated by PW2.

PW8 the doctor testified that the injuries suffered PW1 were consistent with defilement.

In his defence, the appellant did not lead any evidence to contradict the evidence of PW1 and PW2.

The trial court looked at both the prosecution evidence and the appellant's unsworn statement and found the prosecution's evidence as true or credible. As the first appellate court, I have also looked at , and, re-evaluated the prosecution's evidence as well as the appellants evidence as mentioned above.

I have also considered the appellant's grounds of appeal as well as the submission therein, and I am satisfied beyond per adventure or reasonable doubt, the prosecution evidence was both credible and overwhelming and that the appellant did commit the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006.

For those reasons, I find no merit in the appellant's appeal, I confirm both conviction and sentence and dismiss the appellant's appeal.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 5th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE