



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK JJA)**

**CRIMINAL APPEAL NO. 36 OF 2015**

**PAUL OMONDI ATIENO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

(Appeal against the judgment of the High Court of Kenya

at Kisumu, (H. K. Chemitei, J.) delivered on 31<sup>st</sup> July 2014

*In*

***HC Cr. Appeal No. 141 of 2013)***

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**JUDGMENT OF THE COURT**

1. The appellant was charged with defilement of a girl child 15 years' old who was epileptic. The particulars were that on the 29<sup>th</sup> day of June 2012 in Bondo within Siaya County he intentionally caused his penis to penetrate the vagina of SAO a child aged 15 years.
2. PW1 PAO testified that she was the mother to the complainant (SAO). That on 29<sup>th</sup> June 2012 at about 3.00 pm she sent SAO together with another child called E to a posho mill. That SAO does not go to school because she is epileptic. That at about 6.30 pm, the child E came back alone crying. PW1 asked her where SAO was. She said SAO had been taken away by the appellant who came from a forest behind them. That she went to check and met SAO on the road not walking well. She asked SAO what happened. SAO told PW1 that the appellant had held her and taken her to the forest and defiled her. PW1 testified that SAO's skirt was blood stained and torn. She had bruises on her hand. That the following day PW1 took SAO to hospital and reported the matter to Bondo Police Station.
3. The complainant, PW2 (SAO.), after *voire dire* examination gave unsworn evidence. The trial court recorded that though the witness was intelligent enough, she did not seem to understand the sanctity of an oath.

PW2 stated as follows:

I know Omondi. He is the accused (points at accused). I was from posho mill. Omondi did bad things to me at the forest. I was with E. She is a small girl. I was wearing pants. The pants are at home. Omondi tore the skirt. The skirt has blood stains. It was my blood. I went and told my mother. Omondi laid over me. Omondi did bad manners to me here (points at her vagina). The blood on the skirt came from my private parts. My mother took me to Ouya dispensary. I was treated on the hands and they checked where Omondi did to me bad manners. I know Omondi. I have seen him in Bondo. I normally see him at home. He is a farmer.

4. PW4 (E) a child aged 8 years testified on oath after *voire dire* examination.

She testified that:

I know SAO. She does not go to school. There is a day we went to posho mill in the evening. We met with Omondi. I know Omondi. He is in court (points at accused). I know their home. When we met Omondi he greeted SAO with his hand. He told SAO to wait for him. I ran away. It was on the way path. SAO is mentally retarded. I ran home and informed the mother of SAO. I know the clothing

SAO was wearing. Mama SAO went to look for her and I was left at home.

5. PW5 Dr. Oginga testified as follows:

I am a medical officer at Bondo District Hospital. I have medical notes from Owiya Dispensary for a one WO (SAO), a mentally handicapped child. She had a history of defilement by a person well known to her. On examination she was on good condition but mentally handicapped. She was in touch with reality. There was blood in the vagina indicating from hymen..... There was torn hymen and minimal blood clots suggesting forcible penetration.

6. The appellant when put on his defence gave unsworn evidence. He stated that on 15<sup>th</sup> July 2012 he was selling at a kiosk in Nyangoma. At 2.00 pm two people came and he thought they were customers. They removed handcuffs and arrested him. That he did not know what he had done. That he was later taken to Bondo and charged with the offence of defilement. He denied committing the offence.

7. Upon hearing and considering the evidence on record, the trial court convicted the appeal. The learned magistrate held that there was evidence from PW2 which the court accepted that she was defiled. That the evidence of PW 2 was confirmed by the torn and blood stained skirt that was produced as an exhibit. That there was also the testimony of PW1, the mother to the complainant, who stated she had sent the complainant to the posho mill. In arriving at his decision, the learned magistrate accepted the evidence of PW1, PW2 and PW4 and found that the appellant had met PW2 and PW4 when they were from the posho mill; and that the appellant took the complainant to the forest where he defiled her. The appellant was convicted and sentenced to a term of 25 years with effect from 15<sup>th</sup> November 2012.

8. Aggrieved by the conviction and sentence, the appellant lodged a first appeal to the High Court. The appeal was dismissed. In dismissing the appeal, the learned judge expressed as follows:

1. It is first important to ascertain whether the complainant as well as the witnesses knew each other. From the evidence on record, there is no doubt that they knew each other. The complainant on cross-examination told the court that he knew the appellant's name. This was confirmed by PW4. The other relevant issue is the time of the alleged incident. The same occurred at around 6.00pm. None of the witnesses and in particular the appellant contested this fact. The issue of identification, I find, was well settled.

The appellant in his defence did not explain where he was at that particular time so as to counteract what the children were saying. I find that although the complainant and PW4 were of retarded mental station (sic) and of minor age respectively, they were able to identify the assailant positively.

9. Aggrieved by the dismissal of his appeal, the appellant has lodged the instant second appeal citing the following grounds in his memorandum of appeal.

- i. The trial court erred in failing to ascertain the age of the complainant.
- ii. The trial court erred in finding that the complainant was of mental retardation without sufficient direct psychiatric report.
- iii. The trial court erred by relying on the crucial evidence of a minor without corroboration.
- iv. The learned judge failed to scrutinize the evidence on identification.
- v. The judge erred in the duty to re-evaluate exhaustively the evidence on record.
- vi. The judge ignored the appellant's defence evidence and
- vii. That the prosecution did not prove its case to the required standard.

10. At the hearing of the instant appeal, learned counsel Ms Terry Aduol Ngire appeared for the appellant. The State was represented by the Principal Prosecution Counsel Mr. L. K. Sirtum.

#### **APPELLANT'S SUBMISSIONS**

11. The appellant in his written submissions urged that the incident occurred at 6.30 pm and there was no doubt that PW1 was the sole identifying witnesses. That the intensity of the light at 6.30 pm was not given. That the identification of the appellant falls short of the requirements as stated in the case of **Maitanyi – v- R, 1986 KLR 198**. That a properly organized identification parade was not done. That the instant case involved identification by a single witness. That PW2 witnessed the actual act of defilement or the intention to do so. That no witness was brought to corroborate the testimony of PW2. That all other witnesses arrived at the scene after the crime had taken place and neither did they see the perpetrator of the heinous crime.

#### **RESPONDENT'S SUBMISSIONS**

12. The State in opposing the appeal urged us to find that the appeal had no merit. That being a second appeal, this Court can only consider matters of law. That all the ingredients for the offence of defilement were proved to the requisite standard. It was submitted that the sentence meted upon the appellant was proper given the epileptic condition of the complainant.

## ANALYSIS and DETERMINATION

13. We have considered the record of appeal as well as submissions by the appellant and the respondent. This is a second appeal that must be confined to questions of law. In **M’Riungu - v- Republic, [1983] KLR 455**, this Court expressed:

“[W]here a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law”.

14. In **Adan Muraguri Mungara - v - Republic, Cr. No. 347 of 2007 (Nyeri)** this Court set out the circumstances under which it will disturb the concurrent findings of fact by the two courts below in the following terms:

“As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.” See **Aggrey Mbai Injaga v Republic [2014] eKLR**.

15. In **John Mutua Munyoki - v- Republic, [2017] eKLR**, this Court stated that under the Sexual Offences Act, the main elements of the offence of defilement are as follows:

- i. The victim must be a minor, and
- ii. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.

16. In the instant matter, a ground urged is that the age of the complainant was not ascertained. In **Paul Otieno Okello - v- Republic, [2019] eKLR**, the learned judge of the High Court correctly and persuasively stated thus:

I hereby reiterate that proof of the age of a victim in sexual offences is very crucial as that has all the bearing in sentencing. If the age of a victim is not properly settled, then a Court may find itself at a cross road in passing a lawful sentence. Ideally, age ought to be proved by way of documents including, but not limited to, a Certificate of Birth, a Birth Notification, medical documents, official religious documents, official school documents, among others. Having said so, it should not be lost that there are instances where none of the said documents may be available and in such a case a court may revert to its observation of the victim or the oral admissible evidence on record.

17. On the issue of age of the complainant, we have examined the record of proceedings before the trial court. PW1 on cross examination stated that she was the mother of the complainant and she knew the age of the complainant to be 15 years. What better evidence to prove the age of the child than the direct testimony of the mother? On the testimony of PW1, we find that the age of the complainant was correctly determined to be 15 years.

18. The appellant further urged that the two courts below erred in finding that the complainant was mentally retarded yet there was no psychiatric report to establish. We have considered this submission. Indeed, there is no psychiatric report on record. What we have is the direct testimony of PW1 who is mother to the complainant who testified that the complainant is epileptic. There is also the testimony of PW5 the medical doctor who examined the complainant. PW5 stated the complainant was a mentally retarded child. Whatever the case, the mental condition of the victim in a case involving defilement of a child is not an essential ingredient of the offence. What is critical is the age of the victim. In the instant matter, the appellant has failed to demonstrate how the absence of the psychiatric report prejudiced or affected proof or disproof of the offence as charged. In the instant matter, the mental condition of the complainant is a relevant factor to be considered in sentencing the appellant.

19. It was further submitted that the judge erred in convicting the appellant on the evidence of a minor without corroboration. PW2, the complainant, gave a statement in court detailing how she was defiled by the appellant. The testimony of PW2 is corroborated by the evidence of PW4 and PW5. PW4 corroborated the complainant’s evidence of recognition of the appellant. PW5 corroborated the evidence of PW2 that indeed there was penetration of the complainant as her hymen was broken.

20. In terms of identification, we have perused the record of appeal. We are satisfied that the appellant was positively recognized by the complainant as the person who defiled her. In the submissions filed by the appellant, it is urged that identification of the appellant was by PW1. This is incorrect. PW1 did not witness the defilement. She went to look for the complainant and found her on the road not walking well.

21. The appellant further submitted that a proper identification parade should have been done. This ground of appeal has no merit. The appellant was identified by way of recognition. In cases of recognition, an identification parade is irrelevant. In this regard, we are comforted with the dicta in **Anjononi & others v Republic [1980] KLR 57** where it was held:

“...; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or the other.”

22. In penultimate, the appellant urged that the two courts below did not consider his defence. The record of appeal shows that the trial

magistrate considered and evaluated the defence evidence. In evaluating the defence case, the learned magistrate stated:

The accused in his unsworn defence did not address the issue.

He merely explained how he was arrested which was not in itself in dispute. His defence did not therefore displace the prosecution's evidence that he defiled the complainant. He alleged that the complainant's father had threatened him although he had done nothing to him. A person cannot threaten another for no reason. He alleged that the complainant's father does not greet him. There is no requirement that a person should greet another. It is a matter of courtesy. The accused provided no evidence of grudge. I therefore find none.

Even assuming that there was a grudge between the accused and the complainant's father. The father himself was not a witness in the case. There is evidence that the child was indeed defiled. Could the father wish that his own child be defiled so as to fix the accused? I do not think so.... I reject the accused's defence.

23. We have considered the evaluation of the appellant's unsworn statement before the trial court. Without shifting the burden of proof to the appellant, we agree with the trial court that the appellant did not adduce any evidence relevant to the essential ingredients for the charge of defilement. The prosecution case remained unshaken. Based on the evidence on record, we find that the two court's below considered the defence evidence and properly convicted the appellant.

24. On sentence, we have considered that the complainant was epileptic and we find no reason to disturb the twenty-five-year term of imprisonment meted upon the appellant. We note that the learned judge observed that the appellant clearly defiled the complainant by taking advantage of her mental status and her age. The appellant has failed to satisfy us that the sentence meted was illegal, harsh or excessive. We affirm and uphold both the conviction and sentence meted on the appellant.

25. For the foregoing reasons, this appeal has no merit and is hereby dismissed.

26. This Judgment is delivered pursuant to rule 32(2) of the Court of Appeal rules since Odek, JA passed on before the Judgment was delivered.

**Dated and delivered at Kisumu this 3<sup>rd</sup> day of April, 2020.**

**ASIKE – MAKHANDIA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**