Case Number:	Criminal Appeal 45 of 2018
Date Delivered:	09 Nov 2021
Case Class:	Criminal
Court:	High Court at Kitui
Case Action:	Judgment
Judge:	Robert Kipkoech Limo
Citation:	OND v Republic [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Sexual Offence case) 35 of 2012
County:	Kitui
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

HIGH COURT CRIMINAL APPEAL NO. 45 OF 2018

OND.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an Appeal from Original Conviction and sentence in Criminal Case (Sexual Offence case)

number 35 of 2012 in the Chief Magistrate's Court in Kitui

J U D G E M E N T

1. **OND,** the Appellant herein, was charged with the offence of defilement contrary to ***Section 8(1) as read with 8(3) of the Sexual Offence Act No. 3 of 2006***, vide Kitui CM's Court Sexual Offence Case No. 35 of 2012.

2. The particulars are that on 9th October 2012 at around 9PM at around Kwa Mutonga Location within Kitui County, he intentionally and unlawfully inserted his penis into the genital organ of (name withheld) a child aged 13 years.

3. The Appellant denied committing the offence but the trial court found him guilty of the offence and convicted him. He was sentenced to serve 25 years' imprisonment.

4. The prosecution's case against the Appellant at the lower court was fairly straight forward. The Complainant (PW1) testified that she was sleeping alone in the main house, as she waited for her parents to return from a meeting they had attended when the Appellant sneaked into the house and defiled her. The girl narrated to the trial court how the Appellant woke up as she slept on a sofa and how she went to open the door thinking that it was her parents only to be grabbed and forcefully defiled. After the ordeal, the culprit stepped out and that is when she screamed for help attracting the attention of her elder brother, NGK (PW2) who was sleeping in another house nearby.

PW2 testified and largely corroborated her evidence. Both PW1 & PW2 positively identified the Appellant whom they knew well because he had married their elder sister.

5. The medical evidence to wit treatment card (P Ex 3) and P3 form (P ex 4) tendered by Alfred Katutu Mutoka, a Clinical Officer showed that the minor had been defiled.

6. PW4 Francis Kabaria and PW5 Jackson Mureithi Njagi the two police officers called to testify narrated how they got the defilement report and the action taken to arrest and arraign the Appellant.

7. When placed on his defence the Appellant denied committing the offence, He testified that he was arrested on 9/10/2012 while in his house. It was his defence that because he had once married the Complainant's sister and later differed, he was being framed. He further claimed that the doctor had been bribed with Kshs. 1,000 to give false information.

8. The trial court evaluated the evidence tendered and found that the prosecutions had been proved beyond doubt. The Appellant as I have observed was convicted and sentenced to serve 25 years' imprisonment.

9. He felt aggrieved by both the conviction and sentence and filed this appeal raising the following grounds namely: -

i. *That the trial magistrate erred in law and facts by convicting the appellant despite inconsistent, insufficient as well as contradictory evidence*

ii. *That the credibility of PW1's evidence (the complainant) was questionable and doubtful*

iii. *That the medical evidence adduced by the medical doctor which the trial magistrate acknowledged was obscure, indeterminate and professional dysfunctional*

iv. *That the trial magistrate erred in law and facts by not considering that the identification of culprit was not done properly to the required standards in law*

v. *That the trial magistrate erred in law and facts by not putting into consideration that this was farmed case due to the grudge between the sisters of the complainant who was my ex wife*

vi. *That the trial magistrate erred in law and facts by not giving me a chance to defend myself as enriched in the constitution before convicting me.*

10. In his written submissions filed on 4th August 2021, the Appellant advances four grounds in regard to his right of representation. He argues that he was not informed of that Constitutional right. This court however, finds that the Appellant has raised that ground incompetently and improperly because the ground is not one of the ground in his initial petition of appeal. He was required to seek leave of this court as provided under ***Section 350 of Criminal Procedure Code*** in order to rely new additional grounds.

11. He also submits that vital witnesses were not called to testify which I also find to be a new additional ground raised without leave.

12. He submits that, the prosecution's case was not proved beyond reasonable doubt according to him there was no prove of penetration because there were no spermatozoa noted from the Complainant.

13. On sentence, the appellant submits that the trial court did not consider the fact that he was a first offender. He further faults the trial court for not considering the surrounding circumstances in the appellant's case.

14. He further claims that the trial court did not adhere to *Judiciary Sentencing Policy Guidelines*.

15. The Respondent on the other hand, has opposed this appeal. It contends that all the elements of the offence of defilement were proved against the appellant. It points the necessary ingredients as age of the victim, penetration and the identification of the perpetrator.

16. The Respondent in its submissions avers that the age of the victim was established to be 13 years 5 months through birth certificate that indicated that she was born on 11/05/1999.

17. On the question on penetration, the State has pointed out the medical evidence tendered as well as the evidence of the complainant (PW1) shows that there was penetration. The Respondent submits that the blood stained pant was produced as P Ex 1 and that the P3 and treatment chit tendered as P Ex 3 and 4 respectively established beyond doubt that the minor had been defiled.

18. The Respondent finally submits that the Appellant was positively identified by PW1 and PW2. It contends that the appellant

was well known to the said witness.

19. This court has considered this appeal and the response made. I have highlighted both the evidence tendered by the prosecution and the defence offered. The work of this court as an appellate court is to re-evaluate the evidence with a view to coming to own conclusion and findings, well aware that unlike the trial court, I do not have the benefit of having seen the witnesses testify first hand.

20. The Appellant as I have observed above was charged with the offence of defilement contrary to ***Section 8(1) (3) of Sexual Offence Act*** which provides: -

''A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement.''

This appeal has raised the following issues for determination namely;

(i) Whether the prosecution's case against the Appellant was proved to required standard.

(ii) Whether the defence was considered by the trial court.

(iii) Whether sentence imposed was proper.

21. ***Whether the prosecution's case was proved beyond doubt.***

In his first ground of this appeal, the appellant claims that the prosecution's case was marred with inconsistencies and contradictions. According to him the evidence tendered was insufficient to found a conviction. The appellant has failed to demonstrate the inconsistencies and contradictions.

22. The ingredients of the offence of defilement for which the prosecution was required to prove beyond doubt are age, penetration, and the recognition of the offender.

23. Let me begin with the age. The question of age in my view was well established and proved. The minor was 13 years, 5 months. The birth certificate tendered P Ex 2 indicates that the minor was born on 11th May 1999. The incident occurred on 9th October 2012. The P3 tendered as P Ex 4 by the Clinical Officer (PW3) in respect to age is consistent with age assessment report. It indicates that the minor was 13 years old at the material time. The issue of age was therefore established and proved beyond any reasonable doubt.

24. On the question of penetration, I agree with the prosecution that the question was proved beyond doubt, going by the evidence of the complainant, (PW1) who identified the blood stained pant (P Ex 1), she was wearing at the material time, and the medical evidence tendered by the Clinical Officer (PW3), who confirmed that he was the one who examined, treated the minor, and filled the P3 form. I have re-evaluated the evidence of PW1 and find that her evidence was very consistent with the medical findings by PW3. The complainant narrated to the trial court clearly how the incident took place. She testified that, while she was sleeping, someone called her from the window and she immediately though it was her father because he expected the parents to come home in the night. She opened the door and the appellant entered in and simply grabbed her and covered her mouth with a blanket before pulling her skirt up and removed her pant as he proceeded to defile her. The medical evidence, that it the treatment card and P3 tendered are clear and not obscure as contended in this appeal. The Clinical Officer (PW3) stated that when she examined the minor, he found that the walls of her vagina had small bruises and had blood stained discharge. He also found after laboratory analysis, that the girl had been infected with a Sexually Transmitted Disease (STD) and concluded that penetration was positive because the hymen had been broken.

25. On identification, though the appellant contends that identification was not positive, the evidence placed before the trial court showed the opposite. The appellant was not a stranger to the complainant.

26. PW1's testimony was that she knew the appellant as he was previously married to her sister. The complainant stated as follows

on the issue of visual identification;

''....I opened the door and it was you. It was at night around 9.30pm....

…There was moon light outside coming into the house through the windows since windows has no curtains....''

27. PW2, NGK who came to his sister's rescue after he heard her screaming stated that he saw someone running into the farm which was just next to the house. He was able to recognize the appellant even though his back was turned against him. He stated that he flashed him with a torch at around 20 meters away, he did not talk to him as he ran away first. His testimony shows that he was able to recognize him even though the appellant back was turned against him.

28. It is acceptable in law that evidence of recognition is stronger than of identification because recognition of someone known to one is more reliable than identification of a stranger and in this case there was evidence of recognition. Such recognition evidence was held by the Court of Appeal in the case of **ANJONON & OTHERS –VS- REPUBLIC [1980] KLR 59** to be "***more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other"***

29. The appellant was someone who was well known to PW1 and PW2 having been married to their sister. PW1 stated that she was able to recognize the appellant as there was moonlight on the particular night, to that extent, I am of the opinion that the appellant was positively recognized as the perpetrator.

30. The appellant claims that his defence that he was framed was not considered and that he never got a chance to defend himself as enshrined in the Constitution before he was convicted. The appellant has not clearly stated how he was denied a chance to defend himself. He did not raise any issue at trial pertaining to his ability to defend himself. On 8/09/2015, when the trial magistrate was transferred, he applied that the trial starts de novo and the new court granted him his wish and the case started afresh. PW1 was recalled and testified afresh. The record of proceedings shows that the appellant on one occasion demanded that witnesses and even their relatives step out of court before he could cross examine the complainant. Again his wish was granted. He extensively cross examined the witnesses who were called by the prosecution and it is hard to see how he can turn around and say that his Constitutional right to defend himself under ***Article 50 (g)*** was violated. The appellant did not ask to be represented by an advocate and even when he filed this appeal he did not raise that issue. It is quite clear that that issue has been raised as an afterthought. The same is unfounded and the ground was improperly raised without leave of this court.

31. The Appellant further claims that the complainant was used by her sister who was married to him to settle scores because he had abandoned her. The trial court considered the issue and found no merit.

I have re-evaluated the evidence and find that though there was evidence that the appellant was married to complainant's sister, there is no connection with the fact that he committed the offence. If anything, because he concedes that the complainant used to stay at his house taking care of their baby after the sister had given birth, perhaps he eyed her inappropriately and only never got a chance to defile her until much later, when the girl had left his home. I am not persuaded that the other witnesses including the Clinical Officer had any issue or grudge with him to give consistent evidence that defilement had taken place. The appellant's claim that the Clinical Officer was bribed with Kshs. 1,000 is wild and baseless. There was no evidence to support the claim which I find a bit bizarre.

32. This court finds that the appellant's defence was duly considered but the prosecution's case was simply overwhelming. The prosecution proved beyond reasonable doubt that the appellant had committed the offence and was guilty as charged. The conviction was safe and is hereby upheld.

33. On sentence, ***Section 8(3***) provides: -

''Any person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than 20 years.''

The trial court in this instance, sentenced the appellant to 25 years. The Appellant had prayed for leniency stating that he was a first offender. It is true that the trial court exercised its discretion in meting out 25 years but it was a bit harsh on the appellant. This court can interfere with any sentence passed by a trial court as was held in ***Ogolo S/C Owuor versus Republic (1954) 25 EACA 70*** where the court held: -

"This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice"

The trial court could have been in order to mete out 25 years but it ought to have given reasons for giving the sentence.

In the premises, this court finds that the 25 years was a bit harsh and is set aside and appropriate sentence is hereby entered.

The long and short of this is that this court finds no merit on this appeal on conviction. Conviction for the aforesaid reasons is upheld. The sentence however is too harsh and is set aside. In its place, the appellant is sentenced to twenty (20) years imprisonment. I note that the appellant was in custody for about 5 years awaiting trial before he was convicted on 24th October, 2017. Under the provisions of ***Section 333 (2) of Criminal Procedure Code***, that period should be subtracted from 20 years' sentence. This means that the appellant will now serve a sentence of 15 years to run from the date of his conviction on 24/10/2017. It is expected that the appellant will use that period to reflect. Hopefully, by the time he clears his sentence, he will have transformed to become a better person and cause no danger to children or women.

DATED, SIGNED AND DELIVERED AT KITUI THIS 9TH DAY OF NOVEMBER 2021.

HON. JUSTICE R. K. LIMO

JUDGE