



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 3 OF 2020

REPUBLICPROSECUTOR

VERSUS

RONALD LEWA MBAGALAACCUSED

(An appeal from the Judgment by Hon. N.C Adalo, Senior Resident Magistrate, in Mariakani Senior Principal Magistrate's Court Sexual Offence Case No. 11 of 2018 delivered on 20th January, 2020).

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006. He was sentenced to serve 15 years imprisonment.

2. On 4th February, 2020 he filed a petition and grounds of appeal. They are to the effect that the prosecution's case was marred by massive contradictions and discrepancies, the age of the complainant was not proved beyond reasonable doubt, the sentence was harsh, excessive, and unconstitutional due to its mandatory nature. The appellant's other grounds of appeal were that the case was poorly investigated which led to a miscarriage of justice and that his defence was not considered.

3. On 7th August, 2020 Ms Chala filed submissions on behalf of the appellant. She relied entirely on the same. In the said submissions, she focused on 3 issues-

- (i) That the charge was fatally defective;
- (ii) That the ingredients of defilement were not proved and it was not the accused who caused penetration; and
- (iii) That the evidence was inconsistent and contradictory.

4. Issue (i) above was not in the appellant's grounds of appeal. However, in light of the provisions of Article 159(2)(d) that justice shall be administered without undue regard to procedural technicalities, the said issue is hereby deemed as a supplementary ground of appeal and shall be duly considered. Issues No. (ii) and (iii) above have been raised by the appellant in his grounds of appeal.

5. On the issue of the defect in the charge, Ms Chala submitted that the appellant's body organ which caused penetration of the vagina of the victim was not included in the particulars of the charge. She submitted that the said information was vital in a charge of defilement. She stated that the body organ that caused penetration was not mentioned throughout the entire proceedings and that created a gap in the prosecution's case, which rendered the charge defective.

6. Ms Chala submitted that penetration was neither proved nor that the appellant caused the alleged penetration. She further submitted that PW1 only stated that she had sex with the appellant. Ms Chala contended that having sex does not necessarily mean penetration of the penis into the vagina. She relied on the case of **Julius Kioko Kivuiva v Republic** [2015] eKLR, where the High Court acquitted the appellant for the offence of defilement because the victim failed to disclose details of what actually happened during sex. She cited the case of **Furaha Ngumbao Kadenge v Republic** [2018] eKLR, where the Court held that there was no evidence of penetration of the genital organ of the appellant in the victim's genital organ. Ms Chala relied on **Black's Law Dictionary** 9th- Edition at pages 1498 – 1499 to draw a distinction between sexual intercourse and physical sexual activity.

7. On the issue of inconsistencies and contradictions in the prosecution's case, the appellant's Counsel submitted that there were inconsistencies with regard to the victim's actual name because in the evidence she was identified as JKP and in the treatment notes, she was identified as JH, whereas in the list of witnesses, her name was given as JC and in her birth certificate as JM. Ms Chala submitted that there

was no link in all those names and it was therefore doubtful as to what the real name of the victim was. She further submitted that it could not be safely concluded that the birth certificate which has a different name from all the other names referred to one and the same person.

8. The appellant's Counsel indicated that the victim contradicted herself by stating that she was in standard 8 in June as she later said that in June 2016 she was in Form 2. In Ms Chala's view, it was inconceivable that a relationship which started in the year 2016 would result in a pregnancy in 2018 and no explanation was given as to what happened in between that made her not to get pregnant. She submitted that the prosecution failed to prove its case beyond reasonable doubt and prayed for the appeal to be allowed.

9. The Office of the Director of Public Prosecutions filed its submissions on 20th August, 2020 through Ms Njoki Keng'aara, Prosecution Counsel. In response to the issue of a defective charge, Ms Keng'aara referred to the proceedings on the date the plea was taken and stated that on the charge being read out to the appellant, he stated that it was not true as the complainant was his wife and they had a child. That the appellant further said that the complainant was an adult. In regard to the alternative charge, the Prosecution Counsel submitted that the appellant stated that the charge was not true and that the complainant was his wife and they had a child. He further said that she (complainant) was not below 18 years of age.

10. The Prosecution Counsel further submitted that the appellant's response showed that he was aware of the charges read out to him and that the charges involved sex or penetration by the penis into the genital organ of the complainant, which resulted in the conception of the child he was referring to. She also stated the appellant knew what the offence was all about as he denied the charge. It was submitted that at the hearing of the case, the complainant (PW1) narrated of how she had sexual intercourse with the appellant for 2 years and the same led to a pregnancy. Ms Kenga'ara relied on the case of **P.M.M v Republic**, Makueni HCCRA No. 119 of 2019, where the Court found that even if the word penis was not included in the particulars of the charge, it was sufficient if a witness brought out in evidence that the accused inserted his male genital organ in the female's genital organ.

11. The Prosecution Counsel relied on the provisions of Section 382 of the Criminal Procedure Code and urged that the defect in the charge was curable under the said provisions.

12. She stated that the appellant was positively identified as the perpetrator of the offence because he was well known to PW1. She submitted that after PW1's father died, the appellant used to assist her mother financially as she was struggling. It was also stated that one day the appellant went to demand his money from PW1's mother but found PW1 at home and asked her to pay back the money in kind. It was stated that a week later, the appellant defiled PW1 and continued to do so for close to 2 years, which was sufficient time for positive identification to take place.

13. On the issue of age, Ms Kenga'ara submitted that PW1 was 17 years old at the time she was defiled as her birth certificate confirmed the issue of her age.

14. With regard to the medical evidence adduced, it was submitted that PW4, a Clinical Officer, on examining PW1 found that she had a discharge of locha serona from her private parts which was an indication that she had recently given birth. It was submitted that the foregoing proved that penetration resulted in pregnancy.

15. On the issue raised by the appellant's Counsel that there were inconsistencies with regard to PW1's name, the Prosecution Counsel submitted that the appellant had ample time during cross-examination to ascertain the different spellings and order of the names and if they belonged to PW1, but he did not do so. She relied on the case of **Benson Njeru v Republic** [2020] eKLR, which addressed a similar issue as the one that had been raised by the appellant herein.

16. With regard to the sentence imposed on the appellant, Mr. Kirui, Prosecuting Counsel, who represented the ODPP at the time of hearing of the appeal herein submitted that there existed aggravating circumstances which warranted the Magistrate to sentence the appellant to the minimum sentence provided as per the Sexual Offences Act. It was stated that the appellant took advantage of the fact that PW1 was vulnerable as her family owed him money. It was indicated that the Hon. Magistrate took into account the aggravating circumstances and the seriousness of the offence when sentencing the appellant. Mr. Kirui prayed for the sentence to be upheld.

17. In response to the submissions made on behalf of the ODPP. Ms Chala submitted that the aggravating circumstances were raised by the PW1 herself but they lacked corroboration as her mother who testified as PW3 did not talk about owing the appellant any debt. Ms Chala stated that the key factors that she would like the Court to take care of are captured in her written submissions.

DETERMINATION

18. This being the first appeal, this Court bears in mind that the duty of the first appellate court is to analyze and re-examine the evidence adduced before the Trial Court and reach its own independent decision. The 1st appellate Court must however bear in mind that it neither saw nor heard witnesses testifying.

19. I have considered the evidence adduced by the prosecution and taken into account the defence raised. I need not reiterate the said evidence for the reason that I find merit in one of the grounds of appeal raised by the appellant in his appeal. The said issue is of whether the charge against him was fatally defective.

20. It was submitted that the charge against the appellant was defective as in the charge sheet, the victim was referred to by the initials "UN.", yet when she adduced evidence as PW1, she stated that her name was "JKP." [name withheld]. PW2 referred to PW1 by the name "K" [name withheld]. PW1's mother (PW3) referred to PW1 by the name "K" [name withheld]. PW4, PW5 and PW6 referred to her as "JK" [name withheld]. It is therefore not clear to this Court what the initials "UN" in the charge sheet stand for as no one referred to her with names bearing the initials "U" and "N". Although the issue was not raised by the appellant during trial, I realize that he was not represented by Counsel at that time but the issue was raised in this appeal.

21. This Court has carefully considered the gravity of the offence that the appellant was charged with and the evidence tendered by the prosecution. This Court has also weighed whether to allow the appeal or to order for a retrial due to the defect in the charge. In arriving at its decision on the best way forward, this Court has considered the decision in **Muiruri v Republic** [2003] KLR 552 where the Court held as follows –

“.....retrial will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial; the length of time which has elapsed since the arrest and arraignment of the appellant. Whether the mistake leading to the quashing of the conviction were entirely of the prosecution’s making or the court’s”.

22. In the case of **Mwangi v Republic** [1983] KLR 522, at p. 538 the Court of Appeal held –

“We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.”

23. Having considered the evidence that was adduced before the lower Court and the documentary evidence produced in support of the prosecution’s case, I have come to the conclusion that I should quash the conviction against the appellant and order for a retrial as from the evidence adduced, a conviction is likely to ensue.

24. In ordering a retrial, I have considered the interests of the minor who deserves to have her day in Court. Even though the defect in the charge was of the prosecution’s own making, this Court’s view is that each case must be considered in its own special circumstances and no single yardstick should be used to determine different cases that call for different yardsticks to arrive at a just decision. Further, the victim of the offence herein should not be made to bear the brunt of the appellant being set free without being subjected to due process, as a result of the shortcoming by the Prosecution in the drafting of the charge against him.

25. This Court has also considered that the appellant was charged on 26th February, 2018 and was convicted on 20th January, 2020. When his case was ongoing before the Trial Court, he was released on bail pending trial on 13th April, 2018. This Court has also considered that the appellant was sentenced to serve 15 years imprisonment out of which he has served 3 years.

26. This Court notes that in the event that the appellant is convicted and sentenced after the retrial, he will have the right to request for the sentence of 3 years he has served computed from any sentence that may be imposed on him. Having considered the said factors, I hereby quash the conviction against the appellant and set aside the sentence of 15 years imprisonment.

27. The appellant shall be held in prison remand and arraigned before the Principal Magistrate’s Court at Mariakani on 22nd April, 2022 or as soon as a fresh charge sheet shall be presented to the said Court, for the appellant to answer to a fresh charge of defilement and the alternative charge of indecent act.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 4th day of April, 2022. In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of-

Appellant present

Ms Chala absent

Ms Keya, Prosecution Counsel for the DPP

Mr. Oliver Musundi- Court Assistant.