



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 44 OF 2019

FURAHA BUMA ZIMO.....APPELLANT

VERSUS

REPUBLIC.....APPELLANT

(Being an appeal from Lamu PMCRC No. 51 of 2018 presided over

by Hon. S.D. Sitati (RM) and judgement delivered on 10th July 2019)

Coram: Justice Reuben Nyakundi

Mr. Alenga for State

Appellant in person

JUDGEMENT

The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 2/6/2018 at Spatidse village, within Kilifi County, intentionally and unlawfully caused his penis to penetrate the vagina of (C.S) a child aged seventeen (17) years old. The trial proceeded in earnest upon the appellant pleading not guilty to the offence.

At the end of it, the trial court convicted and sentenced the appellant to fifteen (15) years imprisonment.

Aggrieved with both conviction and sentence of the trial court, the appellant preferred an appeal based on the following grounds:

- (1) That the learned trial magistrate erred in law and fact by finding that the conviction and sentence was based on a defective charge.**
- (2) That the learned trial magistrate erred in law and fact by convicting the appellant for the offence, when the age of the victim was never proved beyond reasonable doubt.**
- (3) That the learned trial magistrate erred in law and fact by convicting the appellant without making a finding that the evidence by the prosecution witnesses was contradictory and that some evidence was in breach of section 163(3) of the Evidence Act.**
- (4) That the learned trial magistrate erred in law and fact by convicting the appellant without putting into consideration section 36(1) of the Act.**
- (5) That the learned trial magistrate erred in law and fact by convicting the appellant without considering the defence.**

The appellant argued the appeal by way of written submissions, in which he emphasized two key grounds. First, that the trial magistrate failed to avail the crucial witnesses to prove the elements of the offence. In support of this, the appellant cited the case of **Bukenya v Uganda [1972] EA**.

Secondly, the appellant argued and submitted that the conviction and sentence was mainly based on a defective charge sheet. He referred the court to the illustrative principles in **Augustine Njoroge Retho v R Cr. Appeal No. 99 of 1989**. The arguing and submission on these grounds was that the conviction and sentence should be set aside and the appellant freed from prison-custody.

Learned Senior Prosecution Counsel Mr. Alenga supported the conviction and also that the learned trial magistrate did consider the defence of the appellant.

Replying to the ground on the defective charge, Mr. Alenga disputed that the charge in which the information and particulars of the offence were outlined had any fatal defects. Passing on the ground of appeal with regard to the absence of DNA assessment, Mr. Alenga argued and submitted that it is normally not mandatory to constitute the elements of the defilement offence. That the evidence as a whole supported the charge in which the prosecution proved its case beyond reasonable doubt. Mr. Alenga argued his case and cited the cases of **Koo v R [2019] eKLR** and **Dominic Kibet v R [2013] eKLR**. He therefore concluded and asked this court to dismiss the appeal.

Determination

Being a first appeal court, it's under an obligation to accomplish the task in accordance with the decision of the court in **Pandya v R [1957] EA 336 and Ruwala v R [1957] EA 570**. That duty primarily involves evaluation of the evidence afresh and to draw independent conclusions in deciding whether the judgement of the trial court should be confirmed or set aside. In order for this duty to be discharged appropriately it's imperative to set out the evidence upon which the prosecution based their case in support of the charge to dislodge any defence raised by the appellant.

Apparently, at the trial, the prosecution case had at their disposal a total of three witnesses namely:

PW1 – Dr. Doto who testified on behalf of her colleague Dr. Sushira with regard to the contents in the P3 form dated 6/1/2018 and post rape care. From the evidence of PW1 on examination the victim genitalia was normal saw that her hymen was broken. The age assessment of the victim's ruptured hymen was estimated to be in weeks.

Next to testify was the victim **C.S.K (as PW2)**. From the record evidence, PW2 was aged seventeen years old when the crime was committed against her by the appellant. The victim stated in court that on the day of the offence she was going to the ocean when the appellant stopped her on the way and simultaneously asked her a number of personal questions about herself and the family.

In the course of the conversation, the appellant gave her some Kshs.200/= as a gift to assist her meet any needs she may have at hand. That time they parted ways with appellant. However, their encounter did not end there because on the second time while she was going to fetch water the appellant was a caretaker in that Whiteman's compound. The appellant refused her to enter into the home to fetch the water, but instead gave her some cakes and apples. That casual engagement with the appellant did not end there, as he finally made advances that they became girlfriend/boyfriend. It is clear from PW2's testimony that on 2/6/2018 through her young brother the appellant set for her to go and meet him at the Whiteman's house where he was working as a caretaker.

According to PW2, when she entered the compound where appellant worked, he locked at and entertained her for a little while in that house incidentally, the appellant told her to walk into the inner room which had a bed. That is when the appellant followed her, undressed his clothes and held PW2 with threats not to scream. There was no time to resist any time as the appellant also undressed her, fondling her private parts and in minute inserted his penis to her genitalia to complete the act of penetration.

Later PW2, was released by the appellant with three bottles of oil. On arrival at home, her grandmother became suspicious and did notify her uncles. A decision was made to report the incident to the police who on investigations referred her to the hospital for medical examination.

The police officer **PC Joh Karuti (PW3)** attached to Kilifi police station that on receipt of the defilement complaint he took action of interrogating the victim (PW2) other witnesses. He then referred the victim to visit the hospital for medical examination and age assessment on consideration of the information from the victim and the medical examination, a recommendation was made to charge the appellant of the crime. That formed the gist of the prosecution case against the appellant.

What was the answer to the allegations made against him by the State through the prosecution? In unsworn evidence, the appellant denied the charge. He acknowledged being known to the victim as neighbours within the locality where he also resides. He attributed the complaint against him to a grudge which was precipitated by the issue he raised against the family of PW2 who used to allow their goats to trespass into that compound to destroy the flowers. That complaint resulted in the Whiteman demanding compensation from PW2's parents.

It just happened that the chief of the area summoned him on 3/7/2018 and thereafter he was taken to the police station to be charged with the offence of defilement.

In all that was the defence against his prosecution case on the indictment.

The main issue in the appeal must be on the question whether the learned trial magistrate correctly evaluated the evidence in finding that the appellant committed the offence of defilement contrary to section 8(1) and 8(4) of the Sexual Offences Act. Dealing with that aspect of defilement, the prosecution has a duty to prove beyond reasonable doubt the following elements:

- (i) **The act of defilement of a female through an unlawful and intentional act of penetration.**
- (ii) **That the victim of the offence is aged below eighteen (18) years old.**

(iii) That the appellant was positively identified as the offender of the unlawful act of penetration.

On the ingredient of penetration, section 2 of the Sexual Offences Act, sets the record straight that the act in law is conserved to be complete with either a partial or complete insertion of the male genital organ involved in the anus, the law imposes the same definition. Once again for this element the learned trial magistrate appreciated the evidence of PW2 and that of PW1 which cumulatively persuaded him that the offence of defilement had taken place of significance from the learned trial magistrate evaluation was the admitted documentary exhibits namely; the P3 form and post rape care form. It was stated in the P3 form that on examination of the victim PW2 her hymen was broken and age of the injury estimated to have been a matter of weeks.

The learned trial magistrate made a specific finding replying on the P3 form to the effect that the victim was examined by the doctor on the 3/7/2018 about one month from the time that she was defiled on the 2/6/2018. Be that as it were, the prosecution has proved this element of penetration beyond reasonable doubt.

The law upon the matter of penetration is very clear as illustrated by the following authorities; in **AML v R [2012 eKLR]**:

“The fact of rape or defilement is not proved by a DNA test but by way of evidence, “In addition in the case of Kassim v R Cr. Appeal case No. 84 of 2005 the court stated: “The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or defilement or by circumstantial evidence. (See also Dominic Kibet Mwareng v R [2013] eKLR where the court held that “In cases of defilement, the court will rely mainly on the evidence of the complainant which must be corroborated by medical evidence when it comes to circumstantial evidence in Rex v Kipkering Arap Koske 10 EACA 135. Circumstantial evidence, to sustain in a conviction must point irresistibly to the accused, the inculpatory facts must be incompatible with the innocence of the accused, and in capable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts.”

On consideration of all matters which I have set out and to which the appellant has referred to in his appeal, the conclusions drawn by the learned trial magistrate was basically on the testimony of PW2 both on the commission of the crime and identification of the appellant as the perpetrator.

Therefore, this was a case of a single identifying witness to the fact of defilement and placing the appellant squarely at the scene of the crime.

In regard to the prosecution evidence, it was PW2 who clearly told the court how the appellant invited her to the house where he worked as a caretaker. The initial instances with the appellant were mere advances but act of penetration took place on 2/6/2018. At that incident, PW2 testified that the appellant sent her brother so that she go to that homestead. It was her evidence that after some entertainment, the appellant lured her into the bedroom of his house where the act of sexual intercourse took place.

Apparently, the learned trial magistrate held that PW2 testimony was corroborated by the medical evidence on the ruptured hymen estimated to be some weeks old. It is perfectly clear to the court that in terms of a single identifying witness, the learned trial magistrate must satisfy the criteria in the case of **Maitanyi v R [1986] KLR** before placing reliance on such to convict an accused person. Therein the should held as follows:

“(1) A fact may be proved by the testimony of a single witness but there is need to test with the greatest care such testimony in order to determine whether such a witness was able to make a true impression and description of the suspect.

(2) The factors to be inquired into are the nature of the light available, its size and its position relative to the suspect.

(3) The court must warn itself of the danger of relying on the evidence of a single identifying witness, which warning must be administered before a decision to act on such evidence is made and not thereafter....”

From the analysis of the evidence by the learned trial magistrate it seems clear that he did not administer the necessary warning on the dangers of relying on the evidence of PW2 as a single identifying witness to found on conviction of the appellant. He has simply said that the appellant and the victim knew each other well. His corroboration of that fact is taken out of the strand of evidence given by the appellant in his defence. Once again, as a reminder, the learned trial magistrate was dealing with a transactional event of 2/6/2018. Secondly, it is trite that there is no burden upon any accused person to disapprove his or her innocence as the burden of proof never shifts from the prosecution to the accused save in exceptional circumstances expressly provided for under section (111) of the Evidence Act.

In terms of the principles in the case of **Maitanyi v Republic (supra)**. The failure by the learned trial magistrate to administer the prerequisite caution and warning was a misdirection which easily and likely cast a doubt to the reliability and evidence used to convict the appellant. However, be that as it may be, the other fundamental features relate with the aspect of belief of PW2 made by the learned trial magistrate in his judgement. As I make the following remarks, I am aware of the binding principles in **Pandya and Ruwala cases** on the appellate court jurisdiction when it comes to the demeanor and reliability of witnesses who gave oral testimonies before that trial court:

“The court is mandated to be guided by the impression made by the judge or magistrate who saw the witnesses. Again the same court emphasized that there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court in differing from the judge or magistrate even on question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

But in all circumstances the evidence before the trial court must be evaluated as a whole, to satisfy the criteria of proof beyond reasonable

doubt. (See **Woolmington v DPP (AC) and Minister of Pensions [1947] 1 ALL ER 462**).

On this aspect of the matter, there was first evidence in the post care rape form dated 4/7/2018 in which circumstances surrounding the incident (survivor account) on penetration were indicated as follows:

“Survivor has been in sexual relationship with the perpetrator for the last 1½ years, she had unprotected intercourse on 2/6/2018 with the alleged perpetrator.”

Though the learned trial magistrate was clear in his fundamental findings on belief of the victim, nevertheless this contextual evidence in the post care form, turns against the expected belief and apprehension to cast a doubt on the veracity of her evidence. The other characteristics of PW2 evidence touches on her conduct prior to the actual crime being committed by the appellant. From the record, the victim PW2 is categorical that on the material day it was the appellant who sent her own brother by the name Ellie to call her so that she could meet with the appellant at the Whiteman’s compound. She admits having been seduced by the appellant which was accompanied with tokens of cash. She was therefore familiar why the appellant was sending for her through the brother to go back to that Whiteman’s house.

It’s my view that the trial court at that juncture was called upon to scrutinize the evidence of PW2 carefully to distill any peculiar circumstances that there are which cast a reasonable doubt to her testimony. I am afraid that does not seem to be the case here. It was taken as gospel truth what PW2 outlined to the court on how she was defiled by the appellant on 2/6/2018, inspite of the fact that she was in a relationship with him for 1½ years prior to date in the charge sheet. I therefore further hold the view that PW2 was a convincing witness but not truthful in matters arising between her and the appellant.

According to the victim, it was on 2/6/2018 when the appellant called her through the brother Ellie. On this evidence which featured prominently during the hearing, there was no explanation by Ellie was not summoned as a witness for the prosecution. If that be so, the episode concerning the victim (PW2) was discreditable on account of failure to call that crucial witness. It is true, the prosecution retain a right to exercise discretion in prosecution its case without control and interference from any other person or authority. Either way they must follow the law consequently in the case of **Bukenya v Uganda [1972] EA 549** the court held:

“(1) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(2) The court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case.

(3) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.”

It is manifest from that failure by the prosecution not to call one Ellie as a material witness an adverse inference on the issue concerning the circumstantial evidence could have been appropriate. Further, it would appear from the views expressed by the learned trial magistrate in his judgement the broken hymen was as a result of the sexual intercourse on 2/6/2018 between the appellant and the victim (PW2). He relied mainly on the medical evidence in the P3 form admitted as exhibit 1. It may be wrong to pass an omnibus statement that the broken hymen occurs as a result of sexual penetration of the female genitals. The broken hymen has always to be understood within the context of the guidance provided by the court. In **P.K.W. v R [2012]** thus:

“The courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child’s hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse? “Hymen” also known as vaginal membrane, is a thin mucus membrane found at the orifice of the female vagina (sic) with which must female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of a girl child alleged to have been defiled is proof of the charge. That is however erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. Therese include insertion into the vagina of any object capable of learning it like the use of tampons, masturbation injury, and medical examination can also rupture the hymen or when a girl engages in vigorous physical activities like horseback riding, and gymnastic. There can also be natural tearing of the hymen.” (See also Canadian case of the Queen v Manuel Vincent Quintanila [1999] AB QB 769).

In these circumstances, the learned trial magistrate verdict that the victim’s ruptured hymen occurred during the sexual intercourse with the appellant on 2/6/2018, had no factual or legal basis in relation with the offence at hand. In fact, the evidence by PW1 provided no proof when exactly did the hymen of the victim ruptured and whether the alleged penetration of 2/6/2018 was the sole cause contributable to the rupture. I am also mindful of the evidence of post rape care form in which the victim acknowledges having sexual relationship with the appellant for 1½ years prior to the material day of 2/6/2018.

The links therefore relied upon on medical evidence by the prosecution do not support the case of defilement against the appellant. It is therefore unfortunate that the learned trial magistrate tended to accept the medical evidence as corroborating the testimony by PW2 on the occurrence of the offence those discrepancies in the victim testimony, the documented PRC form and final opinion in the P3 form were never reconciled to proof the charge beyond reasonable doubt against the appellant.

With respect to the age of the victim, it all dependent upon the medical assessment report which pegged it at seventeen (17) years. The lower court dealt in detail with that ingredient and disposed it that there is no dispute as to the age of the victim as indicate in PMFI-3.

Apart from medical evidence, age may be proved by the birth certificate, the victim parents or guardian and by observation or common sense.

In the present case, the age assessment report of 4/7/2018 is just a formal document with no probative value. To my knowledge and the record of the trial court probative value of assessment depends on the source of information on the basis of which the entry made by the doctor in that report can be ascertained as admissible and reliable. This is in contrast with the certificate of birth which comes with a definite date of birth as against a medical report. The medical assessment report was never proved in accordance with section 35 of the Evidence Act. It cannot be acted upon conclusively to prove the age of a minor. There was no inquiry from the medical doctor who conducted the assessment that the victim's age was seventeen (17) years or below eighteen (18) years to bring the charge within section 8(1) and (4) of the Sexual Offences Act.

In my view, that issue of age has an impact over element No. 1 on penetration. There is doubt as to the age of the victim of the offence.

As a result, the appeal has merit and is hereby allowed. The appellant is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF MARCH, 2021.

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Alenga for the State
2. The Appellant