



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CRIMINAL APPEAL NO. 28 OF 2018

KMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in Chuka Chief Magistrate's Court S/O Criminal Case No. 1 of 2018 delivered on 17/10/2018 by Hon. Njoki Kahara (R.M))

J U D G M E N T

Introduction

1. The Appellant was charged with and convicted of the offence of defilement contrary to **Section 8(1) as read with Section 8(2)** of the **Sexual Offences Act No. 3 of 2006** and sentenced to life imprisonment. The particulars of the offence were that on 01/01/2018, at [Particulars Withheld] village, Kamwangu sub-location within Tharaka Nithi county, the Appellant intentionally cause his penis to penetrate the vagina of **CM**, a child aged ten (10) years.

2. Dissatisfied by the said conviction, the Appellant filed his petition and grounds of appeal on 24/10/2018 claiming that the Learned Trial Magistrate erred in law and fact by:

- a. Failing to note that the doctor's report did not support the alleged accusations.
- b. Failing to note that the complainant was coached on what to say in court.
- c. Failing to note that there was no proof of penetration to prove the act of defilement.
- d. Failing to note that the prosecution did not prove its case beyond reasonable doubt.
- e. Not noting that the prosecution evidence was contradicting, uncollaborating (sic) and inconsistent.
- f. Failing to note that the evidence adduced before court was not sufficient to sustain a conviction.
- g. Not noting that the Appellant was only arrested as a suspect but did not commit the said crime.
- h. Rejecting the appellant's defence without giving any convincing reason.

3. Based on the foregoing grounds, the Appellant prayed that this appeal be allowed, sentence be set aside, and conviction quashed.

Prosecution's case

4. The prosecution called 6 witnesses in support of its case.

5. PW1 was the complainant in the case, **CW**. After *voir dire* examination, she was sworn in and testified that she was ten (10) years old and a student in standard 4. A copy of her child immunization card was produced as PExh 1 which shows that she was born on 31/01/2008. According to her, she was asleep in their house on 01/01/2008 at 8.00 p.m. She was with her two brothers and neither her mother nor her father was at home. The Appellant, who is her uncle, came and carried her and took her to a maize farm near the river.

6. It was PW1's testimony that the Appellant removed her panty and forced her to lie on the ground. He also removed his shorts that he was wearing and slept on top of her. He lifted the skirt which she was wearing and inserted his penis inside her vagina (she pointed at her private parts to indicate her vagina). "The accused had sexual intercourse with me" PW1 clarified that the bad act was sexual intercourse. PW1 testified that the Appellant told her not to make any noise or he would kill her using a panga. She stated that she felt pain in her vagina. When he finished having sex with her, he left. PW1 then stood up and went to JG's home who is her uncle. Her father was also at her uncle's house and she told him that the Appellant had defiled her. She was taken to Chuka District Hospital and a report was filed at Chuka Police Station where a P3 form was issued. PW1 identified the Appellant as the one who defiled her.

7. On cross-examination, the complainant stated that the Appellant had sex with her. He inserted his penis in her vagina.

8. PW2 was DM who is the complainant's older brother aged 13 years. After *voir dire* examination, he was sworn in and testified that on 01/01/2018, he was asleep in the house and the complainant was also in her bed. The Appellant, who he knew as his uncle, came and PW2 used a torch. PW2 saw the Appellant enter into PW1's room and then he got out and left. The Appellant then came again and when PW2 heard the door open, he switched on his torch and shone it at him. PW2 saw the Appellant carry PW1 out of the house. PW2 went to his uncle G and told him what he had seen. They started searching for PW1 and the Appellant. After a while, PW2 saw PW1 running to G's house. She was then taken to hospital the same night. It was PW2's testimony that using his torch, he clearly saw the Appellant carry PW1. The Appellant opted not to cross-examine this witness.

9. PW3 was DM, PW1's father and the Appellant's brother. He testified that on 01/01/2018 at about 8.00 p.m., he left the house to go to the market. His brother, G, called PW3 and said that the Appellant had carried PW1 and taken her to the maize plantation. He went back home and found his sons crying. Together with the young men he was with, PW3 started searching for PW1. According to him, one young man found the Appellant with PW1. The Appellant ran away when he saw people coming with torches. He took PW1 to Chuka District Hospital. Once again, the Appellant did not cross examine this witness.

10. PW4 was Hillary Mutuma, a bodaboda rider. He was with PW3 and others on 01/01/2018 at 8.00 p.m. PW3's brother called PW3 and told him to go home. PW4 accompanied PW3 back home where PW3's children told them that the Appellant had run away with PW1. They started searching for PW1 and found the Appellant in the maize plantation. The Appellant ran away. PW4 had a torch and he shone it at the Appellant. PW4 also saw PW1 in the maize plantation. She was crying. According to PW4, the Appellant had raped PW1 and she did not have a panty. PW4 together with PW3 took PW1 to Chuka General Hospital. PW4 knew the Appellant as PW3's brother and confirmed that he is the one he saw on the material night. Again, the Appellant chose not to cross-examine this witness.

11. PW5 was Senior Sergeant Cleophas Okemasisi attached at Marima Patrol Base and the in-charge. He recalled that on 01/01/2018 at 8.30 p.m., he received a phone call from the Assistant Chief Kamwango sub-location about a defilement case from his area. He got a vehicle from Ntumu Police Station while waiting for PW3 to make a report that his child had been defiled. PW5 instructed his officer to accompany the PW1 and PW3 to Chuka District Hospital. The child was examined, treated, and discharged. The following morning, he issued them with a P3 form and instructed his officers to accompany PW3 to go and identify the suspect. The officers arrested the Appellant and brought him to the station where he was charged with the offence. Once again, the Appellant did not cross-examine this witness.

12. PW6 was Hillary Kangichu, a clinical officer at Chuka District Hospital. He filled a P3 form for PW1 sent from Ntumu Police Station and signed it on 02/01/2018. According to him, PW1 had a history of having been defiled on 01/01/2018 by someone known to her. On physically examining PW1, it is PW6's testimony that PW1 had scratch marks on the neck and the degree of injury was classified as harm. She had a fresh visible vaginal tear and her hymen was perforated. There was whitish vaginal discharge. Laboratory tests were done and the results were as follows:

- a. High Vaginal Swab – Spermatozoa seen, pus cells and red blood cells were seen
- b. Provider Initiated Testing and Counselling (P.I.T.) – Negative
- c. Hepatitis B - Negative

13. PW6 concluded that PW1 had been defiled as there was evidence to that. According to him, there were clear signs of struggle because the assailant held PW1 by the neck. He stated that he used the Post Rape Care (PRC) form and treatment notes to fill the P3 form. He then produced the treatment notes, the PRC form and the P3 form as PEXh 2, 3 and 4 respectively. The Appellant did not cross-examine this witness either.

14. On 03/10/2018, the trial court ruled that a prima facie case had been established against the Appellant and he was placed on his defence. The Appellant opted to remain silent and wait for the judgment.

Issues for determination

15. In my view, the main issue for determination is whether the prosecution proved its case beyond any reasonable doubt.

Analysis

16. This being a first appeal, this court is expected to analyse and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive

examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

17. Similarly, in Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

18. Sections 8(1) and (2) of the *Sexual Offences Act* provides as follows:

"8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

19. The ingredients of the offence of defilement can be summarized as follows:-

(i) Age of the victim.

(ii) Penetration

(iii) Identity of the perpetrator

20. It was the duty of the prosecution in the trial court to prove beyond any reasonable doubt that there was penetration of PW1's genital organ that PW1 is a child; and that the perpetrator was the Appellant.

21. In her judgment, the learned trial magistrate found that PW1, the complainant, was aged ten (10) years at the time of the offence based on the child immunization card produced as PExh 1. A look at a copy of the said child immunization card shows that the same belongs to PW1 and that she was born on 31/01/2008. Since the offence took place on 01/01/2018, the trial magistrate was therefore correct to find that PW1 was a minor aged ten (10) years at the time of the offence. The prosecution discharged its burden of proof that the complainant was a child of tender years as she was only ten years old when the offence was committed.

22. As regards penetration, the Appellant alleges in Ground 3 of his appeal that the same was not proved. The trial court relied on the evidence of PW6, the Clinical Officer, (erroneously identified as PW7 in page 3 of the judgment). The trial court also relied on the medical documents produced as PExh 2, 3 and 4. The treatment notes produced as PExh 2 are dated 02/01/2018. The medical documents show that PW1 was treated immediately after the offence. The doctor who examined her found that PW1 had a vaginal tear, her hymen was broken, spermatozoa were present in her vagina and she had vaginal bleeding. The doctor also noted scratch marks on PW1's neck which he took as a sign that there was a struggle between PW1 and her assailant. The doctor, who is an expert in his field, confirmed that the victim had been penetrated. The evidence of PW1 was corroborated by medical evidence. The Court of Appeal and the High court has held that penetration need not be proved by medical evidence, the testimony of the victim is sufficient to prove penetration. In this case the complainant gave evidence that the appellant penetrated her. I find that penetration was proved to the required standard. This ground fails.

23. In view of this evidence, I am of the view that the trial court was correct to find that PW1 had certainly engaged in sexual intercourse on 01/01/2018. I agree with the respondent's submission that the complainant gave evidence as to what happened and the medical evidence corroborated her testimony. Accordingly, it is my view that the Appellant's contention in Ground 1 of his appeal that the doctor's report did not support the alleged accusation is unfounded and therefore fails.

24. This then leaves the issue of identification of the Appellant as PW1's assailant. It was PW1's testimony that it was the Appellant who had sexual intercourse with her on the material date. In her evidence in chief, PW1 gave details of how it all happened. She stated that the Appellant, who is her uncle, went to their house on 01/01/2018 at around 8.00 p.m. while she was asleep. He then carried her to a maize plantation and forced her to sleep on the ground. He then removed her panty, removed his shorts, lifted her skirt up and slept on top of her. PW1 testified that the Appellant inserted his penis in her vagina.

25. PW2, who is PW1's brother, testified that he saw the Appellant carry PW1 from the house. He knew that it was the Appellant because he used a torch and saw that it was the Appellant, his uncle. Considering the testimonies of PW1 and PW2, I find that the trial magistrate was correct to find that it was indeed the Appellant who defiled PW1 on 01/01/2008. The appellant did not challenge the evidence of PW1 and 2 in cross-examination. They knew the appellant and there was no possibility of mistake. Furthermore, there is the testimony of PW4- who spotted the appellant in the maize plantation where the complainant was defiled and he fled when he shone a torch on him.

26. The Appellant also contended in Ground 2 of his appeal that the complainant was coached on what to say in court. Bearing in mind that this court did not have the opportunity to see or hear the testimony of PW1 or any of the witnesses, I can only rely on the record and I see nothing to suggest that the witness was coached. The Appellant never cross examined the witnesses and when called upon to put in his defence, he opted to remain silent. It is thus surprising that he chose to claim in Ground 8 of the appeal that the trial court rejected his defence without giving any convincing reason. I also note that the Appellant opted to keep quiet during the hearing of the appeal.

27. In the circumstances, find that grounds 4, 5, 6 and 7 of the appeal also fails. The evidence led by the prosecution was consistent and well collaborated. The same was sufficient to sustain a conviction as it proved that PW1 was defiled, that PW1 was ten years old at the time she was defiled and that it was the Appellant who defiled PW1. In the end, I find that prosecution did prove its case against the Appellant beyond any reasonable doubt as penetration was proved, the perpetrator was identified, and the age of the victim was also proved. The trial court cannot be faulted for convicting the Appellant of the offence of defilement contrary to **Section 8(1) as read with Section 8(2) of the Sexual Offences Act**. The conviction of the appellant was safe.

Conclusion

28. I note from the heading of the appeal that the same was against the conviction and sentence meted out against the Appellant. However, none of the grounds of appeal raised by the Appellant touch on the issue of sentence. The sentence imposed on the appellant was lawful and in the absence of any ground challenging the sentence, I have no reason to interfere with it. Sentencing is the discretion of the trial court. Looking at the notes on sentencing, the trial magistrate properly considered relevant factors and the sentence is not manifestly harsh. My finding after analyzing all the evidence is that the conviction of the appellant was proper. The appeal is without merits and is dismissed.

Dated, signed and delivered at Chuka through virtual proceedings this 27th day of May 2021.

L. W. GITARI

JUDGE

27/5/2021