



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 22 OF 2018

BEO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the decision and judgment of the Honorable J.M Nang'ea, Chief Magistrate, delivered on the 17th day of January, 2018 in Mombasa Criminal Case No. 2356 of 2016).

J U D G M E N T

1. **BEO** the appellant herein was aggrieved by the judgment delivered on 17/1/2018 Mombasa CM's Court Criminal Case No. 2356 of 2016 by Hon. J.M Nang'ea (CM) where the appellant was convicted and sentenced to serve 20 years' imprisonment.

2. The grounds of Appeal in petition filed herein are stated as follows: -

i. That the learned trial Magistrate erred in law & fact by convicting me without considering that the charge of defilement was not proved to the required standard of law.

ii. That the learned trial Magistrate erred in law & fact by failing to note that doctor's evidence does not support the offence of defilement.

iii. That the learned trial Magistrate erred in law & fact by failing to consider that the prosecution did not prove its case to the required standard of law.

iv. That the learned trial Magistrate erred in failing to consider my defence.

3. In amended grounds of appeal filed on 27th October 2020 the appellant's grounds were stated as: -

i. That the learned trial Magistrate erred in law and fact in convicting the appellant on a defective charge.

ii. That the learned trial Magistrate erred in law & fact in convicting the appellant by relying on medical report which was doubtful and inconclusive.

iii. That the learned trial Magistrate erred in law & fact by convicting the appellant whereas the conviction was against the weight of the evidences.

iv. That the learned trial Magistrate erred in law and fact by failing to fully consider the appellant's defence.

v. That the learned trial Magistrate erred in law & fact by convicting the appellant by relying on uncorroborated evidence of a child.

vi. That the learned trial Magistrate erred in law & fact by convicting the appellant on conflicting and contradictory evidence.

vii. That the sentence passed in the circumstances was manifestly excessive

4. The appellant was charged with defilement contrary to Section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006. Particulars were that BEO on diverse dates between the 25th November, 2016 and the 28th of November, 2016, at [Particulars withheld] area in Likoni Sub-County within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of Beatrice Ughanga a child aged 13 years.
5. In the alternative the appellant was charged with offence of committing an indecent act with a child contrary to Section 11(i) of the Sexual Offences Act No. 3 of 2006.
6. The prosecution's case was that PW 1 BU the Complainant herein on several occasions in November 2016 was defiled by the Appellant. PW1 testified that she lived with her mother and her siblings in a Swahili type of house. That sometimes at night in 2017 or 2016, at around 11.00 p.m. she left the house to go to the toilet where she met Babu who was also a tenant in the building, outside the toilet. The premises they occupied belonged to the Complainant's grandmother hence Babu was her grandmother's tenant. She further testified that Babu asked her to accompany him into his house which was behind the toilet and she agreed.
7. PW 1 stated that while in Babu's house, he asked her to lie on a mat on the floor and remove her trousers and panty which she did thereafter, Babu inserted his "mdudu" which he uses to urinate into her vagina, penetrated her three times and as she left for her house he gave her Kshs. 100. PW 1 stated that during this time her mother and siblings were asleep. It was PW 1's testimony that Babu had also penetrated her on two other occasions one of which was a Tuesday, she however could not remember either the year or the month.
8. She further stated that each time they committed the act, Babu would give her money. PW 1 testified that she later visited the toilet at night and saw Babu's door open, as she entered his house her aunt A who lived with them held her and alerted her mother and the other tenants. Babu was thereafter arrested by the police and she was taken to a hospital in Likoni where she was examined. She stated that she had known Babu for long.
9. During cross examination PW1 stated that she was 14 years and that she had not planned with her aunt to catch the appellant. She stated that the appellant would occasionally pay her Kshs. 30, Kshs. 40 or Kshs. 100 and that the appellant was never hostile to her. PW 2 AWO testified that she lives in Likoni Mombasa in a Swahili house. That on 28th November, 2017 at around 12.30 a.m. she went to the toilet and noticed that someone was using one of the toilets, as she returned to the house, she saw the complainant who is also her niece getting out of the toilet and going to the house of their neighbor called BO.
10. It was stated by PW 2 that she woke up brothers and sisters and went to B's room at this time the complainant had returned to the house and on interviewing her she told them that B had been inviting her to his house for sexual intercourse and he would give her money. It was her testimony that B was their tenant and he lived alone. In cross examination, she denied having any knowledge as to what the complainant does for a living, she also denied any knowledge of whether the appellant had her mother a house in Voi or anywhere else.
11. PW 2 stated that she normally works as her mother's cashier in her businesses however her family does not owe him any money and on the night she found the complainant going into his house, she said she had not had sexual intercourse with him on that particular night. PW3 JWM the complainant's mother stated that on 28th November, 2016 at around 12.30 a.m she was at home when she received a call from her sister PW 2 asking her to go to their other home where they lived since her daughter the complainant herein had been seen coming from the house of their tenant the appellant herein that particular night.
12. On inquiry, the complainant told them that she has been having sexual intercourse with the appellant, at this point, they arrested the appellant and handed him over to the police and took the complainant to Likoni Health Centre and Coast General Hospital for examination. It was PW 3's testimony that the doctor's found that the complainant suffered an infection and that she had been penetrated. PW 3 confirmed that the appellant was their tenant who despite not paying his rent regularly, they had no grudge with him. She also stated that the complainant is 15 years old and produced a copy of her birth certificate. During cross examination she stated that at the time of recording her statement she did not have the complainant's birth certificate that is why her statement indicates that she was 13 years however at the time she was 14 years.
13. PW 3 in cross examination denied any knowledge of her mother owing the complainant any money and stated that the premises the appellant lived in belonged to two other people. The investigating officer PC Nicholas Mutai testified as PW 4. He stated that he was informed of the arrest of the appellant herein by the OCS of Likoni Police Station on 29th November, 2016 at around 4.00 p.m. he stated that on summoning the complainant's mother, she came with medical records which indicated that the complainant had been defiled. The investigation officer produced the treatment records, PRC and forms as Plaintiff Exhibits 1, 2 and 3 respectively. He also produced the complainant's original birth certificate as Plaintiff Exhibit 4.
14. PW 4 testified that he erroneously indicated on the P3 Form that the child was taken to the hospital on 9th January, 2016 instead of 9th January, 2017 since it was the end of 2016. On cross examination, the investigating officer stated that the appellant didn't ask to be medically examined during his investigations of the case, he further stated that the PRC shows that there was evidence of defilement and that there was no other suspect investigated in the matter.
15. DR. Tima Nassir testified as PW 5 stated that she examined the complainant aged 23 years on 6th April, 2017 for defilement by a person known to her. She noted that her hymen was broken and there was a foul smell emanating from her vagina. She further stated that an infection was detected in her urine. PW 5 testified that the P3 form was not stamped by the hospital, she went on to state that it is the responsibility of whoever brings a sexual offence victim to the hospital to take back the P 3 form after filing for submission to the hospital administration for stamping.
16. At the close of the prosecution case, the appellant was put on his defence here he opted to give sworn evidence and call no witnesses. In his defence, the appellant stated that he was a mason, in July, 2016 his land lady one mama J and her daughter A hired him to construct a house for them. On 15th October, 2016, they took him to Voi where he met the area chief and was showed the plot. That on 18th November,

2016 he travelled to Voi with the said A, the land lady and other relatives and he begun the construction.

17. The appellant testified that he was being paid by A. He built two houses on the said plot and was not paid part of his charges. The appellants defence was that he met A and the complainant on 25th November, 2016 and A promised to pay him. That on 28th November, 2016 at 12.00 a.m while in his rental premises in Likoni he was woken up with allegations that the complainant had been seen getting out of his room that night, he was also accused of defiling the complainant that night. The appellant testified that he was assaulted and he demanded to be taken to the police station where J told him that he had been forgiven but was required to leave the rental premises. He further stated that they owe him Kshs. 43, 000 for work done in Voi.

18. This appeal was canvassed way of written submissions. The appellant's submissions were that he was convicted on a defective charge. Mr. Mushelle submitted that the nature of the charge preferred against the appellant required the prosecution to envisage a situation whereby several specific incidents occurred would lead to several counts of defilement. He submitted that in the present case, the appellant was only charged with one count of defilement therefore it is unknown on which particular date the offence was committed. Counsel submitted that the manner in which the charge sheet was framed was non-specific and prejudicial to the appellant therefore fatally defective.

19. Mr. Mushelle submitted that the medical report was doubtful and inconclusive since the P3 form indicated that the matter was reported to the police on 29th November, 2016 yet the victim was escorted to hospital by the police on 9th January, 2016, the said difference was never corrected up to the time it was produced in Court. Counsel submitted that the said P3 form was also not stamped therefore it should not have been relied on by the trial Magistrate.

20. Learned Counsel submitted that the prosecution did not call any eye witnesses and the medical report was faulty for lacking a stamp and being signed six months after the alleged incident. It was also submitted by Mr. Mushelle that a broken hymen is not proof that it was broken by the appellant since there are several causes that can lead to a broken hymen therefore the appellant's conviction was against the weight of the prosecution's evidence.

21. Learned Counsel submitted that the trial Magistrate failed to consider the appellant's defence which brought about the issue of a grudge due to non-payment of the Appellant's wages. He submitted that complainant's mother's testimony ought to have been ignored as it was tainted with malice. Mr. Mushelle submitted that the evidence of a child has to not only be treated with caution but also must be corroborated. In this case, the evidence of the complainant who was 13 years was not corroborated either by other prosecution witnesses and/or medical evidence relied on by the prosecution.

22. Mr. Mushelle submitted that the prosecution's evidence was conflicting and contradictory, he submitted that the medical report indicated that the complainant was 13 years at the time the alleged offence occurred however, PW 3 stated that she made an error at the time she recorded her statement and indicated that the complainant was 13 years instead of 14 years. It was also submitted that the charge sheet indicated that the complainant was 13 years, thus incapable to discern the actual age of the complainant at the time of the offence.

23. Learned Counsel submitted that in the circumstances, the sentence passed was manifestly excessive. In conclusion Mr. Mushelle submitted that the prosecution failed to prove its case beyond reasonable doubt hence the trial Magistrate ought to have acquitted the appellant, Counsel urged this Court to allow the appeal, quash the conviction and set aside the trial Court's sentence.

24. Ms. Karanja submitted on behalf of the prosecution. She submitted that the charges as drafted sufficiently disclose the offence the appellant was charged with and the dates disclosed are discernible, she relied on the provision of Section 134 of the Criminal Procedure Code which sets out the requirements for a proper descriptive charge sheet and submitted that all the requirements contained therein were met by the prosecution.

25. Ms. Karanja submitted that the prosecution relied on three separate medical documents to prove the offence, the treatment notes which were prepared on 29th November, 2016 which is within 24 hours of the matter coming to light and the PRC form dated 30th November, 2016 which is within 48 hours of the defilement. Learned Counsel submitted that the P3 Form was filled 5 months after the incident since the doctors were on strike at the time, she further submitted that whether the P3 form was stamped is neither here nor there as the doctor who personally examined the complainant testified in Court.

26. Ms. Karanja submitted that all the medical documents had the same finding therefore there was no doubt in the trial Magistrate's mind that the ingredient of penetration for this offence was proved. She submitted that the prosecution proved their case by proving penetration and the age of the complainant through medical evidence and the complainant's birth certificate respectively. Learned Counsel submitted that from the testimony of PW 2 there was no doubt as to identification as the appellant was the culprit.

27. Learned Counsel cited Section 124 of the Evidence Act and submitted that the trial Court did not err in believing the complainant's testimony. On the appellants defence, Ms. Karanja submitted that the trial Magistrate in her judgment detailed the appellant's defence and formed an opinion that it was outdone by the weight of the prosecution evidence. This Court was urged to dismiss the appeal in toto for lack of merit.

28. Having re-evaluated and analyzed the evidence adduced before the trial court in line with authority in *Okeno vs Republic* (1972) EP 32 the issues for determination are:-

a) Whether the charge was defective.

29. The appellant submitted that the charge sheet was incurably defective since it was non-specific on when exactly the alleged offence occurred therefore prejudicial to the appellant. He submitted that the prosecution should have stated on unknown dates or dates between the 25th November, 2016 and not diverse dates. When it comes to particulars of a charge I am guided by the provisions of Section 134 of the Criminal Procedure Code which provide as hereunder:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

30. The test to be followed in determining whether a charge sheet is defective was laid down by Ngugi. J in **B N D vs Republic [2017] eKLR**, as follows:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective.”

31. In the present case, the charge sheet under particulars of offence states that “on diverse dates between 25th November, 2016 and 28th November, 2016.....”, the appellant contended that in framing the charge in that manner, he was prejudiced since it was not known on which specific date the offence occurred. He went further to state that the prosecution should have stated on unknown dates or on dates between. It is this Court’s finding that the charge sheet as framed is not ambiguous in any way instead, it is very clear that the offence was committed on diverse dates between 25th November, 2016 and 28th November, 2016 thus specific to 25th, 26th, 27th and 28th of November, 2016.

32. In find that the charge as framed was not defective. The charge and the particulars of offence were very clear since the Appellant was able to prepare for his defence and adequately cross examined the prosecution witnesses on the basis of the said charge. The challenge to the appellant’s conviction on the basis of a defective charge must fail.

(b) Whether the medical report was doubtful and contradictory.

33. The appellant contended that the P3 form indicates that the matter was reported to the police on 29th November, 2016 and that the victim was escorted to the hospital by police on 9th January, 2016. He further stated that the P3 form was filled on 6th April, 2017 which is roughly six months later after the commission of the alleged offence and the said P 3 form was not stamped.

34. I have gone through the record of appeal and found that indeed the incident was reported to the police on 29th November, 2016. I also find at page 37 of the Record, the investigating officer who testified as PW 4 stated that he erroneously indicated that the child was taken to the hospital on 9th January, 2016 instead of 9th January 2017 since it was the end of 2016. I find that the explanation given by PW 4 to be satisfactory as to the difference in dates. This explanation was also given before the close of the prosecution case which was sufficient.

35. From the record, it is clear that the P3 form was filled much later due to the fact that the doctors were on strike around the time the alleged offence took place. It is also clear that the P3 form does not bear a stamp, I find that this omission was cured by the doctor who testified as PW 5 who was also the same doctor who examined the complainant and whose name appeared on the P3 form. It is my finding that it is not safe to say that the medical report was inconclusive as submitted by the appellant consequently, the appeal fails on this ground.

(c) Whether the conviction was against the weight of the evidence.

36. To answer this question adequately, the Court has to determine whether the prosecution proved its case beyond reasonable doubt. In doing so, this Court shall deal with 3rd, 5th and 6th grounds of appeal concurrently. For the prosecution to prove its case beyond reasonable doubt, it has to prove that there was penetration, it has to positively identify the assailant and it has to prove the age of the complainant. On the issue of penetration, the complainant testified that sometime at night in 2017 or 2016 she had sexual intercourse with the appellant and thereafter he gave her Kshs. 100. She testified that she had sexual intercourse with the appellant on two other occasions one of which was a Tuesday.

37. The P3 from indicated that the complainant’s hymen was broken by a blunt object probably a penis. I have also gone through the PRC form and found that it indicates that the hymen was broken. It is my finding that the complainant’s evidence on penetration was corroborated by medical evidence despite the fact that the prosecution had no other eye witness other than the complainant.

38. On the issue of identification, the appellant was a neighbor to the complainant since 6th May, 2016 which means they interacted on various occasions to the point that the Complainant referred to the appellant as Babu a name which the appellant did not deny belonged to him. The complainant also testified that later she went to the toilet and saw the appellant’s door open and as she went to enter into his house, she was caught by her aunt PW 2. This averment was corroborated by PW 2 in her testimony. In view of the foregoing, I find that the appellant was positively identified as the perpetrator.

39. The age of the complainant was proved by production of her original birth certificate by PW 4, this cures the contradictions by the complainant’s mother who stated that the complainant was aged 13 years when she was recording her statement. On the issue of the complainant’s uncorroborated testimony, I am guided by the provisions of **Section 124 of the Evidence Act** which provides as follows;

“Corroboration required in criminal cases

Notwithstanding the provisions of [section 19](#) of the Oaths and Statutory Declarations Act ([Cap. 15](#)), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

40. It is trite law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony, corroboration is unnecessary. As was held in **Johnson Muiruri vs. Republic, (1983) KLR 445** as follows;

“Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration.”

41. In the present case, the trial Magistrate conducted a voir dire examination on the minor and was convinced that she understood the meaning and significance of an oath, therefore the complainant gave a sworn testimony and was cross-examined by the appellant. This Court therefore concludes that the complainant’s testimony need not to have been corroborated, however be that as it may, from the record it can be seen that the complainant had a good recollection of the events preceding the occurrence of the offence herein, therefore the appeal fails on these grounds.

(d) Whether the Appellant’s defence was considered.

42. The appellant in his defence stated that the charges and evidence against him were tainted with malice since he had carried out some work for the complainant’s family who owed him Kshs. 43, 000. Section 109 of the evidence act provides that, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In the case before us, it was the duty of the appellant to prove that he was engaged by the complainant’s grandmother to do some work and that he was still owed for work done, thus establishing the complainant malicious intent as alleged. This was however not done.

43. I also find that at page 53 of the record of appeal the trial Magistrate considered the appellant’s defence and concluded that it was an attempt to exonerate himself from the criminal act. This Court therefore finds that the appeal fails on this ground as well.

44. In light of the above, I find that the prosecution proved its case beyond reasonable doubt, I will not therefore interfere with conviction of the trial court. In regards to sentence, Section 8 (3) of the Sexual Offences Act provides for imprisonment for a term of not less than twenty years when the offence is against a child between the age of twelve and fifteen years. However, in consideration of Supreme Court decision in **Francis Muruatetu** on the mandatory nature of sentences, the appellant’s mitigation during sentencing and the appeal herein, I would find that a term of 10 years would be sufficient punishment. I therefore substitute the trial court’s sentence of 20 years’ imprisonment and sentence the appellant to ten years’ imprisonment. Since the appellant had been in remand custody since 30.11.2016. The sentence should run from 30.11.2016. The appeal is therefore succeeds on all of sentence only. The other grounds of appeal are dismissed.

It is so ordered.

Right of appeal 14 days.

Dated, signed and delivered in open court at Mombasa this 25th day of May, 2021.

HON. LADY JUSTICE A. ONG’INJO

JUDGE