REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL CASE NO. 55 OF 2018

(An Appeal Arising from the Judgement of Hon. S.N. Mwangi dated 26th October, 2018 in the Chief Magistrate's Court at Nyahururu)

BENSON MBUGUA NJOROGE.....APPELLANT

-VS-

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

1. The Appellant was on 26th October 2018 convicted and sentenced to imprisonment for 15 years for the offence of defilement contrary to ***Section 8(1) as read with Section 8 (3) of the Sexual Offences Act, No. 3 of 2006***, the particulars of which were that the Appellant;

> ***"On the 9th day of November 2015 at [Particulars Withheld] area in Gilgil Sub-County within Nakuru County, intentionally unlawfully caused his penis to penetrate the vagina of IMN, a child aged 14years."***

2. He also faced the alternative charge of committing an indecent act with a child contrary to ***Section 11 (1) of the Sexual Offences Act No. 3 of 2006***, the particulars of which were that the Appellant;

"On the 9th day of November, 2015 at [Particulars Withheld] area in Gilgil Sub-County within Nakuru County intentionally and unlawfully caused his penis to come into contact with the vagina of IKN, a child aged 14years."

3. The Appellant was aggrieved by both the conviction and sentence and filed this appeal raising the following 12 grounds of appeal namely:-

> ***I. That the learned trial magistrate grossly erred both in law and facts in convicting and sentencing the Appellant without considering the Respondent's case was not proved beyond reasonable doubt.***
>
> ***II. That the learned magistrate erred both in law and fact by convicting the Appellant and yet the age of the minor was not proved.***
>
> ***III. That the learned trial magistrate grossly erred in law and in fact in convicting and sentencing the Appellant on the offence charged when the salient ingredients were not established to the required standard in the entire proceedings.***
>
> ***IV. That the learned magistrate erred both in law and in fact by convicting the Appellant yet penetration was not proved.***
>
> ***V. That the learned magistrate erred both in law and fact by convicting the Appellant on the basis of contradictory evidence.***
>
> ***VI. That the learned magistrate erred both in law and fact by convicting the Appellant on uncorroborated evidence.***
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> ***VII. That the learned magistrate erred both in law and in fact by relying on extraneous matters to convict the Appellant.***
>
> ***VIII. That the findings of the learned magistrate were against the weight of the available evidence on record.***
>
> ***IX. That the learned magistrate erred both in law and in fact by according undue weight to the purported timid evidence of the prosecution***

X. That the learned trial magistrate erred both in law and in fact by convicting the Appellant merely on the basis of suspicion.

XI. That the learned magistrate erred both in law and fact by shifting the onus of proof on the Appellant throughout the trial.

XII. That the learned trial magistrate erred both in law and in fact in failing to accord weight to the Appellant's defence.

4. Parties counsels were directed to canvass the appeal via written submissions.

Appellant's Submissions

5. The Appellant through his counsel, Mr. Ng'etich filed Written Submissions dated 11th March 2021 stating that the issues for determination before this court were:-

· ***Whether the salient ingredients of the offence of defilement were proved beyond reasonable doubt***

· ***Whether the trail court erred in law and fact by failing to accord weight to the Appellant's defence***

6. Counsel submitted that the trial court concocted a finding that was baseless as there was no evidence from the Complainant that she had slept with the Appellant before 9.11.2015 and that the Complainant had testified that on 9.11.2015 was the first time she had met the Appellant. Further, the trial court only came to a conclusion to charge the Appellant with defiling the Complainant on 9.11.2015 and not any other prior date since it could not reconcile the testimony of the Complainant and that of pw4, the clinical officer.

7. The Appellant submitted that there was no penetration into the vagina of the Complainant that occurred on the material date and this was corroborated with evidence given by PW4 that although the hymen was broken, it was old. Moreover, in re-examination PW4 stated that medically when the hymen is broken above 3 weeks to a month is what they call old and that the Complainant told him she was defiled on 10.11.2015 and he examined her and filed the PRC form on 13.11.2015. The Appellant argued that even if we assume that the Complainant was defiled on 9.11.2015, as stated in the charge sheet then at the time of examination her hymen would have been broken 4 days earlier yet the Complainant testified that the Appellant was her first and she slept with him on 9.11.2015. Consequently, for the trial court to assume that the one who penetrated her was the Appellant was a miscarriage of justice since there was no evidence proving the same.

8. The Appellant submitted that although PW4 categorically stated that he did not compare the pus cells found in both the Complainant and the Appellant to establish whether they were the same, the trial court assumed that the pus cells were the same instead of giving the Appellant the benefit of doubt. This assumption was not backed by any evidence.

9. It was the Appellant's counsel submission that there was doubt created from the prosecution's medical evidence as they established that the Complainant was penetrated before 9.11.2015 and that the Appellant could have been sexually active before the said date and the pus cells could have belonged to his other partner.

10. Moreover, it was their submission that the Complainant told PW4 that she slept with the Appellant without a condom and yet in his examination no spermatozoa was found in the Complainant. Also, the Complainant testified that she told the police that she willingly slept with the Appellant and therefore the Appellant had no reason to hurry the process accordingly spermatozoa ought to have been found in her.

11. Further, counsel submitted that although PW4 filled the PRC form and P3 form on the same day he did not indicate on the latter that the hymen was broken and such discrepancy ought to have led the trial court to give the Appellant the benefit of doubt since it further demonstrated that the Complainant's hymen may or may not have been broken depending on what form one is looking at.

12. The Appellant submitted that the trial court did not strictly comply with the provisions of ***Section 124 of the Evidence Act*** when it accepted the Complainant's testimony as the truth because the trial court did not record the reasons as to why it was satisfied that the Complainant was telling the truth as required by that section. Counsel submitted that there were a lot of inconsistencies in the prosecution's case including the Complainants' age, the period in which the Complainant stayed with the Appellant and the Complainant's mixed reactions as to what had happened between her and the Appellant.

13. Counsel stated that the trial court rejected the defense's evidence without giving reasons as the Appellant had testified that he only took the Complainant to DW2's home and later left and went back to the camp since there was a meeting scheduled for that day; evidence that was corroborated by DW2 and DW3. He submitted that DW2 and DW3 were alibis for the Appellant as they placed him at different places at different times hence proving that he did not defile the Complainant. He also stated that the Appellant believed the Complainant was 19 years old.

14. Additionally, counsel cited the following cases in his submissions ***David Chege Wahinya v Republic (2016) eKLR***, ***Martin Nyongesa Wanyonyi v Republic (2015) eKLR***, ***John Mutua Munyoki vs. Republic (2017) eKLR, Erick Onyango Ondeng' vs Republic (2014) eKLR, Paul Gitari v Republic (2016) eKLR, Kimotho Kiarie v Republic (1984) eKLR, Irene Atieno Ochieng v Republic (2017) eKLR, Martin Charo v Republic (2016) eKLR, Gerald Ndoho Munjuga v Republic (2016) eKLR.***

Respondent's Submissions

15. The Respondent's submitted that the age of the Complainant was proven through the immunization card produced as P.Exhibit 1 which showed her date of birth as 14th May 1999 which puts that Complainant at 16years of age at the time of commission of the offence.

16. The Respondent's further submitted that penetration was clearly proved as per the definition in ***Section 2 of the Sexual Offences Act*** vide the Complainant's statement contained on page 54 line 16-17 of the Record of Appeal where the Complainant testified that ***"he would put his stick into my place for urinating and I never used to check. He did it only once in his house."*** It was the Respondent's submission that although PW4 testified that on genital examination the genitalia was normal externally and the hymen was broken but not fresh this does not prove that penetration did not occur as there were pus cells on both the Appellant and the Complainant proving that they had engaged in the act of sexual intercourse.

17. The Respondent submitted that the Appellant was identified by way of recognition by both pw1 and pw5. PW1 testified that the Appellant used to live in Kiambogo but outside the camp.

18. The Respondent submitted that the magistrate was right to dismiss the Appellant's defence as the Complainant stated that she had informed him that she was fourteen years contrary to what the Appellant said and further the magistrate duly warned herself before relying on the proviso of ***Section 124 of the Evidence Act***.

19. In conclusion, the Respondent submitted that the prosecution had discharged its burden and proved the case beyond reasonable doubt and prayed that the appeal be dismissed in its entirety.

Analysis and Determination

20. In making its determination, this court shall be guided by **Okeno vs Republic (1972) EA 372** where it was stated that;

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTITLAL M RUWALA V R, [1957] EA 57). 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 courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."***

21. It has been held in several decisions that to prove the offence of defilement the following ingredients have to be established: -

> · ***Proof of the age of the Complainant***
>
> · ***Proof of penetration***
>
> · ***Proof that the Appellant was the perpetrator of the offence***

On the age of the Complainant

22. In **Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010** the Court of Appeal stated that:

> ***"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".***

23. The age of the Complainant is a question of fact to be proved by available evidence. The Complainant's age was proved by the Child Health Card or Immunization Card produced a Pexh 1 which confirmed that the Complainant was born on 14th May 1999 therefore putting her at 16 years of age at the time the alleged offence took place. Accordingly, the trial court by relying on the immunization card as the most conclusive piece of evidence on proof of the Complainant's age, rightly found that the Complainant was a minor within the meaning of the law. This position finds support in the case of ***JOA vs Republic (2019) eKLR*** where it was stated as follows:-

> ***'It is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim.'***

On proof of penetration

24. ***Section 2 of the Sexual Offences Act*** defines "penetration" as:

> ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

25. In order to prove penetration in rape cases and defilement, the court usually banks on the Complainant's own testimony which is usually corroborated by the medical report presented by the medical officer as decisive evidence.

26. In the present case, the Complainant testified that:-

> ***"I do know the accused person as my man i.e. my boyfriend……***

……we lived together as husband and wife and we used to make love as couples do.

He used to tell me to give him properties as his wife. We used to do success. I don't know he used to do men and not women. He enticed me. He would tell me to remove my clothes and sleep on my bed. He could come on top of me and do bad manners. He would touch me on my body. I don't know which part of his body and I don't know where he would touch me. He would put his stick into my place for urinating and I never used to check. He did it only once in his house. We would struggle with him because I wasn't used to it. It happened shortly and then he would let me go.

……they asked me questions if I was forced and I said I did it on my own will."

27. On cross examination she asserted that

""I just longed to have my own man and I didn't know my age. I told him I was 14 years…..I slept with him the first day we got to his home. Before then I had not slept with any other man before."

28. On re-examination by the magistrate she stated that:-

"I came to know Benson the day he took me. I can't recall the exact date. Before then I had not slept with anyone before…..I slept with him for 2 days. I was his wife for 2 days. I wasn't defiled by force. I had agreed the same day I went with him."

29. PW4, Philomena Kiprono, a medical officer testified that she examined the Complainant and filled the PRC form on 13/11/2015 which she produced as Pexh 3. Upon physical exam, she noted that there were no marks and injuries externally. Upon genital exam she noted that the genetalia was normal externally, the hymen was broken but not fresh. Upon lab and blood sample investigations the results were HIV negative, VDRC was negative, pregnancy test was negative and urinalysis showed nothing significant but had traces of blood and pus cells. Further, she produced the P3 form marked as Pexh 2 which she filled on 13/11/2015 indicating that she found both the labia majora and minora were normal and no lacerations were noted. She also noted whitish discharge from external genetalia and hymen was broken. Additionally, she produced the Appellant's treatment sheet. She testified that he had no injuries at all and the blood tests for HIV and VDRC were negative, urinalysis indicated lack of proteins or glucose although there were pus cells.

30. It was her testimony although the Complainant and accused both had pus cells she could not confirm whether they were the same. On being cross examined, PW4 indicated that if indeed the Complainant was forced to have sex, it is likely she would have sustained injuries but at the time of exam there were no injuries. On re-examination she reiterated that the hymen was broken but was old although she didn't have a specific age. Notably, she pointed out that freshly broken hymen could be bleeding and painful on examination and 2 days cannot have the hymen be said to be old. Above 3 weeks to a month is what is termed as old for a hymen that is broken. She noted that the injuries could have healed and further stated that pus cells are sexually transmitted.

31. I have carefully perused the trial court and took keen note that when the Complainant testified she stated that they lived together with the accused as husband and wife and they used to make love as couples do. She testified that when she was at the police station she was asked questions if she was forced and she said she has done it on her own will. Further, upon re-examination by the magistrate the Complainant stated that she was not defiled by the Appellant and that she slept with him for 2 days as his wife. Evidently the Complainant and the Appellant were in some sort of intimate relationship as the Complainant referred to him as her man when she testified. The Complainant alluded to the fact that she was not forced severally when she testified. The crux of this issue began when he took her in to live with him as his wife. However, this does not negate the fact that she was a minor and therefore incapable of giving consent when the alleged offence took place.

32. I have very carefully examined her testimony and the prosecution's testimony at large and I find that there are fundamental inconsistencies that dent the prosecution's case. It is trite law that the prosecution is required to prove its case beyond all reasonable doubt. Yet in this case, the evidence relied on by the prosecution has done little to erase doubts as to the commission of the offence of defilement by the Appellant particularly on the element of proof of penetration. The glaring inconsistencies in this case are such that they have left gaps in the prosecution case. Specifically, the medical report relied on by the prosecution does not support its case. It is apparent that it does not prove that the Appellant defiled the Complainant on the material day stated in the charge sheet. Had the Appellant indeed defiled the Complainant on the material day, then the hymen would have been indicated as freshly broken.

33. It is evident based on the material on record that the accused and the Complainant not only knew each other, but were in a boyfriend–girlfriend relationship. While the evidence does not support the charge of defilement, it does point to the conclusion that there was contact between the Appellant's body part(s) with the genital organ of the Complainant. Section 2 of the ***Sexual Offences Act*** provides inter alia as follows:

"indecent act" means an unlawful intentional act which causes-

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

(b) exposure or display of any pornographic material to any person against his or her will;

34. The Complainant did in fact testify in support of this conclusion. Their relationship notwithstanding, the law is that a child is incapable of giving consent, and as such, I am convinced that the prosecution proved the alternative charge wherein the Appellant was charged with the offence of committing an indecent act with a charge. ***Section 11(1) of the Sexual Offences Act*** provides that:

"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

35. I would therefore allow the appeal to the extent and effect;

i. Appellant conviction is substituted to that of the offence of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.

ii. The also quashes the sentence of 15 years imposed on him and substitute it with the period already served.

iii. He shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 24TH DAY OF JUNE, 2021.

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CHARLES KARIUKI

JUDGE