



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 21 OF 2018

STANLEY MUCOKA KIRIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. P.K. Mutai, Resident

Magistrate, delivered on 31st day of August 2017 in Kwale

Chief Magistrate's Court Sexual Offence Case No. 4 of 2017).

J U D G M E N T

1. Stanley Mucoka Kiria was an accused in Kwale Magistrates in Sexual Offence Case No. 4 of 2017 with the offence of defilement contrary to Section 8(I) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.

2. Particulars were that Stanley Mucoka Kiria on diverse dates between 6th November 2016 and 23rd December 2016 at around 1300hrs at Tini Location Kwale County within Coast region intentionally and unlawfully caused his penis to penetrate the vagina of FN a child aged 13 years.

3. In the alternative the Appellant was charged with the offence of committing an indelicate act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

4. Upon the trial Magistrate considering the prosecution case and the unsworn testimony of the appellant the Appellant was found guilty and convicted and sentenced to serve 20 years imprisonment.

5. The Appellant was aggrieved by the conviction and sentence and by amended grounds of Appeal filed on 23rd September 2020 he appealed to this court on the following grounds:-

i. That the learned Magistrate erred in law and fact in proceeding to try, convict and sentence the Appellant based on a defective charge sheet.

ii. That the learned trial Magistrate erred in law & fact by proceeding to convict the Appellant on evidence that was insufficient, contradictory and uncorroborated.

iii. That the learned trial Magistrate erred in law & fact cannot considering appellants defence evidence in disparaging the defence offered by the Appellant against the tenants of National justice.

iv. That the learned trial Magistrate erred in law & fact in proceeding to convict and sentence the Appellant despite anomalies and clear discrepancies in the post-rape care form & P3 form.

v. That the trial Magistrate erred in law & fact by proceeding to convict the Appellant when in essence no evidence had been adduced to support the alleged charge.

vi. That the learned trial Magistrate erred in law & fact by failing to reasonably consider the evidence tendered by the Appellant & accord it the weight it deserved hence erroneously making a finding that the complainant had proved her case

beyond reasonable doubt.

6. The prosecution's case was that the Appellant had defiled the 13 years old daughter of his friend on 2 occasions once in her parents' bedroom when he found her alone at home and on another occasion when he found her grazing animals in the field and he told her not to tell anyone and even gave her 150/=.
7. On 20/12/2016 he had again gone to complainants home and was trying to lure her to get to his house when the father of the complainant returned unexpectedly and appellant escaped.
8. PW 3 saw someone escape from his home and on interrogating the daughter learnt it was the Appellant. They also learnt that he had had sexual intercourse with the complainant. PW 3 went to call his wife PW 2 from her place of work and reported to the Chief. They were given a letter to take to Tiwi AP Post so that the Appellant could be arrested. PW 5 effected arrest and took the Appellant to Kwale police station where investigations were conducted and Appellant charged.
9. The Complainant was taken to hospital examined and treated by PW 6 - Mohamed Hawadh-Clinical Officer at Kwale Hospital. PW 6 said that though the complainant's hymen was broken there were no visible injuries noted in her private parts. The Appellants and the Complainant, were examined for any infectious but there was none. P3 and PCR forms for complainant were produced EXPL and 7. P3 form for Appellant was also produced EXHT.
10. The Appellant in defence gave sworn statement and said that Lydia caused her to be arrested on 31/12/2016 over palmwine which he had not paid. That he was escorted to Kwale Police Station where he stayed in cells for 4 days and he was being told to apologize but he didn't understand reasons to apologize. That on 4/1/2017 he was charged with allegations which are false.
11. DW 2 Village Chairman testified that Appellant was Community Health Volunteer & Village Secretary. He said he knew nothing about defilement case. He said he knew that parties had a grudge which was resolved at the village level but Complainants mother vowed to teach the appellant a lesson. The appeal herein was canvassed by way of written submissions.
12. Prior to this court delivering a judgment herein on 4/2/2021 the Appellants counsel filed an application seeking that the court admits additional evidence as to the complainant's age as she had been issued with an identity card on 31/10/2019 indicating she was born on 7/8/1999 and she was therefore not a minor by the time she was alleged to have been defiled.
13. This allegation was interrogated by the court and Ms. Karanja confirmed that the complainant had applied for and obtained a National ID Card under circumstances that may incriminate her if she was to swear an affidavit.
14. The Complainant was taken for age assessment and by letter dated 24/05/2021 from Coast General Hospital, it was confirmed she was 19 years old. Age assessment report from Kwale District Hospital dated 3/1/2017 also indicated the Complainant by then was 13 years old. She was in class five as per letter dated 30th December 2016.
15. The Appellant's counsel submitted on conviction only and not sentence. The Appellant counsel's submissions in respect to ground 5 was that trial Magistrate relied on insufficient, evidence contradictory and uncorroborated to convict the Appellant.
16. It was argued that age and penetration was not proved as the dates when offence was allegedly committed and the dated on charge sheet as well as fact that report was made on 2017 creates an impression in the mind of the court that the Complainant was not a straight forward person and suspicion is created about her trustworthiness and therefore an unreliable witness and it is unsafe to accept her evidence. This position was supported by the holding in **Ndungu Kamanyi vs Republic [1979] KLR 282**.
17. The Appellants counsel argued that the report against him was accentuated by malice and ill-will and his defence is valid. It was also submitted that the age of the complainant was not proved.
18. The Respondent on the other had submitted that complainant informed the court she was defiled in the month of November 2016 on a date she could not remember and again on 20th December 2016 and that this informed the decision to include the diverse dates in the charge sheet.
19. It was argued that the Appellant was left with no doubt from the proceedings what the date of the offence was. That section 382 of the Criminal Procedure Code states that unless there is a failure of justice any error, omission or irregularity on the charges shall not lead to a reversal of a sentence. It was submitted that there was no failure of justice occasioned herein.
20. It was argued that the Medical Officer's testimony did not exonerate the Appellant. It was submitted that the age of the complainant was proved as PW 1 said she was 13 years and this was corroborated by PW 2 and the Investigating Officer who took her for age assessment. That the treatment notes, P3 & PRC forms indicated the complainant was 13 years old and that there was no doubt in the trial courts mind that the complainant was 13 years old and it was the prosecution's contention that the ingredient of age was conclusively proved.
21. It was submitted that the defence by the Appellant was displaced by the totality of the prosecution evidence as established by the trial court and which also found that the issue of grudge was unbelievable. The Respondent urged the court to dismiss the appeal.
22. This is a 1st appeal and the appellate court has the mandate to re-evaluate the evidence in the lower court record as well as the judgment of the trial Magistrate and weighing the same against the grounds of appeal and submissions by respective parties reach an independent conclusion. This was the holding in **Okeno vs Republic [1972] E.A 32**.

23. Having considered the grounds of appeal the submissions as well as records of the lower court the issues that fall for determination is whether the prosecution proved all ingredients of the offence of defilement beyond all reasonable doubt namely:-

- Age
- Penetration
- Identity of the perpetrator

24. There was no dispute that the appellant was known to the complainant and her parents. PW 2 blamed her husband who was a friend to the Appellant for what befell their daughter. The father of the Complainant said in cross examination he didn't know the appellant who was his friend could do such a thing as defile his daughter.

25. On issue of age the Complainant, her mother and father both put her age at 13 years. The P3 form, treatment notes & PRC form indicated she was 13 years old at the times she was allegedly defiled. The investigating officer went ahead to conduct investigations as to her age because there was no certificate of birth or notification of births and age assessment report from Kwale District Hospital dated 3/01/2017 showed the Complainant was 13 years old and that she was a class 5 pupil as per the letter dated 30th December 2016 from her school.

26. When the Appellants counsel sought to adduce additional evidence as to the Complainants age the complainant was again subjected to age assessment at Coast General Hospital on 24th May 2021 and it was established that she was 19 years old. This means that by 2016 when she was defiled by the Complainant she was 13 years old. I do find the Respondents explanation as to how the Complainant obtained her identity card cannot vitiate the fact that she was 13 years by the time she was defiled. She merely cheated she was older to get an ID Card and she could have cheated she was younger for her own purposes.

27. The submission as to the date when offence was committed has also been explained by the Complainant and the prosecution drafted a charge sheet to include the diverse dates because the Complainant was defiled more than once and it was on the 3rd attempt that the Complainant father him at his home preying on the daughter and he escaped. That is when PW 1 revealed what had been happening.

28. The Complainant was taken to hospital and examined and found to that her hymen was broken. There was no evidence that her hymen was broken in any other way other than by being defiled repeatedly by the Appellant. There was therefore proof of penetration.

29. The conclusion that this court makes is that the appeal has no merit and the same is dismissed.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 21ST DAY OF OCTOBER, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel – Court assistant

Appellant – Present in person

Mr. Mulamula for Respondent

Mr. Egunza Advocate for Appellant – No appearance

Hon. Lady Justice A. Ong'injo

Judge