



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO. 55 OF 2019

KENNEDY HAMISI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal from the decision of; Hon. J. Kibosia SRM, rendered on;

31st October 2018, vide S.O Case No. 93 of 2016).

1. On the 16th day of July 2016, the appellant was arrested and arraigned in court on; 19th July, 2016, charged with the offence of; defilement contrary to; section 8(1) as read with; section 8(2) of the Sexual Offences Act No. 3 of 2006 (herein “the Act); in the main count and an alternative count of; committing an indecent act with a child contrary to; section 11(1) of the Act.
2. The particulars of the charge(s) are that, on the 16th July, 2016, at Mukuru Kwa Njenga, in Embakasi Sub-County, within Nairobi County, the appellant intentionally caused his penis to penetrate the anus of “TT” a child aged 5 years, and/or in the alternative, caused his penis to touch the anus of “TT”.
3. The appellant pleaded not guilty to each count and the case proceeded to full hearing. The prosecution case was led by the evidence of; (PW1) the complainant (herein “TT”), who testified that, on the 16th July, 2016, at about 10.00am, the appellant, who was well known to him, went to their home and took him and his brother to his house. Their father was away at work and the mother was not staying with them.
4. That, the appellant told them to lie on the mattress, which was on the floor. The children complied and he took his “chuchu” and inserted in the complainant’s anus. That, as he was defiling the complainant, he ordered his brother to look away. The complainant testified that, he felt pain and cried but the appellant covered his mouth.
5. However, someone who heard him cry and went to his rescue and helped him dress up and then informed the father. The father then took him to hospital. Subsequently, the matter was reported to the police station and the appellant was arrested and charged.
6. The complainant identified the appellant herein, as the person who sexually assaulted him. That, he knew the appellant as he used to visit his father and the appellant’s house is not far from their house.
7. The prosecution further called (PW2) No. 100382 PC Regina Kisang, attached to Mukuru Police Post, who informed the court that, she took over the investigation of the case on; 14th June, 2018 from the initial Investigating Officer; Charity Tuimising who was on leave, therefore, she was testifying on her behalf.
8. At that point, the prosecution requested the court to allow the witness to produce the exhibits in the police file. The court granted the request and the witness produced the; P.3, PRC form(s) and a medical summary report from; Mama Lucy Hospital, all dated 16th July, 2016.
9. At the end of the evidence of these two witness, the prosecution closed its case and the court ruled that, the appellant had a case to answer. In an unsworn statement, the appellant told the court that, he was arrested as a result of a “conflict” and/or a grudge between him and one Baba O; the complainant’s father, who wanted the land where the appellant has built his house. He therefore denied defiling the complainant.
10. He further testified that, although, the appellant’s father later wanted the matter settled out of court, while the mother wanted the case

withdrawn, he declined to settle the matter out of court. But, the Investigating Officer allegedly was given money to fix him and he was charged as herein stated.

11. At the conclusion of the case, the trial court rendered its final decision vide a judgment delivered on; 31st October, 2018, wherein the appellant was found guilty on the main count and convicted accordingly under section 215 of the Criminal Procedure Code (Cap.75) Laws of Kenya. He was subsequently sentenced to life imprisonment.

12. However, the appellant being aggrieved by the entire decision of the trial court, lodged the appeal herein vide; a petition of appeal dated 15th January, 2019 on the following grounds; -

a) *That the trial magistrate erred in law and fact by failing to find that the elements of defilement; (penetration, age and identification), were not conclusively, proved to warrant a conviction;*

b) *That there were unsurmountable inconsistencies, contradictions evidence (sic) and uncorroborated and there was no proof that was tendered to the required threshold of proof hence the evidence as adduced was inconclusive to attain a conviction;*

c) *That the trial magistrate erred in law and fact by failing to find that essential witnesses necessary to prove basic facts did not testify;*

d) *That the trial magistrate erred in law and fact by failing to consider the appellant's defence.*

13. The appeal was served upon the Respondent and on; 23rd February, 2021, when the matter was listed for hearing, the Respondent informed the court that they were ready to proceed, however, the matter was adjourned to; 26th April, 2021, as the appellant had not received the lower court proceedings.

14. On the next hearing date, the Learned State Counsel; Ms. Kibathi requested for fourteen (14) days to respond to the appeal. The request was granted and matter stood over to; 4th October, 2021 for further orders. On that date; the Learned State Counsel; Ms. Chege informed the court that, her colleague Mr. Muluma had filed written submissions. However, it suffices to note that, at the time of writing this decision no formal response has been filed by the Respondent.

15. Be that as it were, the appeal was disposed of by filing of submissions. I have considered the appeal in the light of the material before the court, including the submissions and I find that, first and foremost, **the role of the 1st appellate court, is to evaluate the evidence afresh and arrive at its conclusion. It is however, important to note that, the appellate court did not have the benefit of seeing the witnesses' demeanour.**

16. **This role was well articulated in the case of; *Okeno vs. Republic (1972) EA 32* where the Court of Appeal stated;**

“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 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, see Peters vs. Sunday Post [1958] E.A 424.”

17. To revert back to the matter herein, the appellant was convicted of an offence of defilement. The offence is created under section 8(1) of the Act, which states that; a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. The essential elements of defilement are settled as; proof of the age of the victim, penetration, identification and/or recognition of the perpetrator or offender.

18. I shall first deal with issue of the age. In that regard, it is settled law that, primary evidence in proof of the age of a person is; the birth certificate or a medical report and/or a document prepared by a competent medical practitioner. The secondary evidence would be; the evidence of a parent or guardian, or physical observation of the child and/or common sense (see *Hilary Nyongesa vs Republic (Uganda) HCCRA No. 123 of 2009*).

19. However, for the court to rely on the secondary and/or alternative evidence, a reasonable and satisfactory explanation must be offered as why the primary documentary evidence cannot be availed.

20. In the instant matter, the charge sheet indicates that; the complaint was aged five (5) years old. That was the age to be proved. In addition, the charge describes the complaint as a child.

21. The definition of a child under the Act is that a “child” has the meaning assigned thereto in the Children Act. The Children Act then defines a child as; “any human being under the age of eighteen years”. Therefore, the complaint's age had to be proved as both five (5) years and/or below eighteen (18) years.

22. Indeed, the proof of age in cases of; defilement is very critical in that, the age of the complainant determines the sentence to be imposed upon conviction of the accused.

23. The complainant herein did not attest to his age, save to; state that, he was in school, in a pre-unit class. The prosecution did not adduce any other documentary evidence or otherwise. In fact, the learned trial Magistrate herein, acknowledged that, no document was produced to prove the age of the complainant, but went on to state that, from the interaction with him, and common sense, he was about 5 years old.

24. With utmost due respect, for the court to arrive at the decision that, the age of a complainant is proved, evidence must be adduced, the trial court cannot rely purely on its "own evidence". In my considered opinion, the age of the complainant was not adequately proved.

25. The next issue to consider is whether the element of defilement was proved. The term penetration is defined under section 2 of the Sexual Offences Act, as follows: "penetration" means "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

26. The complainant testified that, the appellant took his "chuchu" and put in his anus and that, he felt pain. Of course, the appellant has denied the commission of the offence. The question that arises is whether; the prosecution proved the element of penetration.

27. In addressing the issue, the learned trial Magistrate stated as follows: -

"In this case, the minor stated that, the accused caused his penis to penetrate his anal opening and that he felt pain. There was no eye witness availed to attest to this fact but the relevant medical documents were produced. During cross-examination the minor told the accused that he is the one who did "tabia Mbaya" to him. I received the evidence of the minor after conducting voire dire examination and established that, he was telling the truth. In the absence of corroborative evidence, I am guided by the Learned Judge in the case of George Muchika Lumbasi vs Republic 2016 Eklr"

28. The court in the aforesaid decision dealt with the application of the provisions of; section 124 of the Evidence Act. Therefore, learned trial Magistrate herein, relying on that decision, **further stated as follows: -**

"The victim in this case gave evidence and medical documentations produced to this effect. Both P3 form and PRC Forms indicate that, he got bruises at the anal opening at; 6, 10 and 12 o'clock".

29. I have indeed considered the medical documents availed to the trial court and in my considered opinion, they indicate that, the complainant was indeed defiled based on the fact that, the P3 form states that, there were bruises at anal opening at; 6, 10, and 12 o'clock position. In the same vein, the PRC form similarly indicates there were bruises at 6,10, 11 and 12 o'clock positions and he had dry whitish discharge around the anal region. These findings are also similar to those on the medical report from Mama Lucy Hospital. The evidence therefore indicates there was penetration.

30. However, the key question is; how were these medical documents produced and/or admitted in evidence? It suffice

31. s to note that, admitting documentary evidence requires originality and authenticity to be proven. It is trite law that, if evidence is not led to prove originality and authenticity, such evidence will only qualify as hearsay evidence, (see *Rautini vs Passenger Rail Agency of South Africa (Case no. 853/2020) (2021) ZASCA 158 (8 November 2021)*).

32. In the instant matter, none of the makers of the subject medical reports were called to give evidence. The court record shows that; no effort was made to call the maker of; the PRC form, nor the summary of medical records from Mama Lucy Hospital.

33. In the same vein, several adjournments were given to the prosecution to avail; Dr Maundu who filled the P3 form, to no avail. Subsequently, summons were issued severally for his attendance without success and eventually on 11th July 2018, when the prosecution applied for an adjournment, to enable Dr Maundu to attend court, the request was denied.

34. The prosecution then applied that, (PW2) No. 100382 PC (W) Regina Kisang be allowed to produce the medical documents but the appellant protested as she was not the original investigating officer. The witness was stood down for original investigation officer to be called. However, the same witness was recalled and produced

the medical documents, against protestation from the appellant.

35. In my considered opinion, the Investigating Officer had no legal authority to produce the documents when the makers had neither identified them in evidence nor testified to the same. The documents were thus inadmissible and sadly so, penetration element was not proved.

36. It also suffices to note that, other than the doctor, several other witnesses were not called to testify. The person who allegedly rescued the complainant, his parents, the arresting officer and the initial investigating officer were not called to testify. The court record in this matter shows that, these witnesses failed to honour court summons on several occasions. At one time a warrant of arrest was issued against the parents of the complainant and the investigation officer.

37. In the final analysis, the investigation officer did not show up and when the prosecutor applied for summons to issue against her, the accused objected to the adjournment; where upon the trial court declined any further adjourned and stated that, the accused had wanted the original investigating officer to be called. At that point, the prosecutor addressed the court stating that; "I will not need her. I will close the case. We will not be filing submissions"

38. Therefore, the only direct evidence of the occurrence of the offence was led by the complainant alone. The court is aware that; a single witness evidence is adequate to prove a case, as provided for under section 124 of the Evidence Act, which states as follows:

“Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim 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 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.”

39. However, the trial court did not record any reasons as to why the complainant’s evidence which was uncorroborated was sufficient to sustain a conviction. It is clear from the lower court record that, this case was extremely poorly investigated and handled by all the parties involved.

40. In fact, the complainant’s single evidence on the identity of the appellant remains uncorroborated and fails the test of authenticity. All in all, I find that, the prosecution did not adduce adequate evidence to support the conviction rendered by the trial court and the resultant sentence, I there quash the conviction and set aside the sentence meted upon the appellant. He shall forthwith be released from custody unless otherwise lawfully held.

Those then are the orders of the court.

Dated, delivered and signed on this 23rd day of December 2021.

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant in person

Ms Chege for the Respondent

Edwin the Court Assistant.