



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 60 OF 2019

FRANCIS MAKAU MULI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appealing from the Judgement of Hon. G. Shikwe, Resident Magistrate

at Kithimani delivered on 31st January, 2017 In Criminal Case SOA No. 72 of 2015)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS MAKAU MULI.....ACCUSED

JUDGEMENT

1. The appellant, **Francis Makau Muli**, was charged before the Senior Resident Magistrate's Court at Kithimani in Criminal Case SOA No. 72 of 2015 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the **Sexual Offences Act**. The particulars of this charge were that on the night of 20th and 21st December, 2015 at [particulars withheld] Village in Masinga Sub County within Machakos County, the appellant intentionally and unlawfully caused his penis to penetrate the anus of **AMM**, a child aged 11 years.

2. He also faced an alternative of indecent act with a boy contrary to section 11(1) of the same Act, the facts being that on the said day at the said place, he intentionally touched the buttocks of the said AMM.

3. After *voir dire* examination, PW1, the complainant testified that on 20th December, 2015 at 8.30pm he was heading home from Matuu Church and was about to board a *matatu* when the appellant, who was unknown to him, called him. The appellant got him into a *matatu* and got him to alight at a market called Kasuangove after which the appellant took him to a homestead where he was employed as a farm hand. There the appellant ordered him to lie down under the threat of being harmed and then removed the complainant's clothes and penetrated the complainant's anus. The following day, the appellant gave him Kshs 50/= and told the complainant to go away. The complainant was then given a lift in a private vehicle and reported the incident after which he was taken to the hospital, examined and given medication. The complainant then took police officers to the farm where he had been defiled from where the appellant was arrested.

4. PW2, the complainant's mother testified that the complainant who was aged 12 years based on his baptismal card went to church on 20th December 2015 and when PW2 returned home, did not find him despite searching for him the whole night. The following day she was called by the police and informed that the complainant had been assaulted and the culprit arrested. She however did not know the appellant.

5. PW3, the clinical officer examined the complainant on 21st December, 2015. According to him the complainant had injuries on the left shoulder where he claimed he had been beaten. The examination however revealed no bruise, tear or discharge from the anus. He exhibited his report and the p3 form.

6. According to PW4, on 21st December, 2015 the complainant went to the station and reported that he had been defiled by the appellant the previous day. The complainant then showed them the appellant's home from where the appellant was arrested.

7. At the close of the prosecution's case the appellant was placed on his defence in which he stated in his unsworn statement that he met the complainant in Matuu who wanted some work so he took him home but realised that the complainant was still school going and informed him that he could not work. The complainant spent the night in his house and the following day he released him.

8. In his judgement, the learned trial magistrate found that there was a possibility that there was partial insertion and that that would not yield any visible injuries. He however found that in order to avoid speculation, there was no penetration hence the ingredient was not proved to the required standards. He however believed the complainant on the alternative count and found the appellant guilty of the said count, convicted him accordingly and sentenced him to 10 years imprisonment.

9. The appeal was conceded to by the Respondent through its learned counsel, **Ms Mogoi** on the ground that there was no evidence of penetration. However, it is not automatic that this court must in those circumstances allow the appeal since the court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565**, the court said:

“the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence.”

Analysis, Re-evaluation and Determination

10. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174**.

11. Section 8 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.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence to a charge under this section if -

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

12. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** where it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

13. No issue arises as regards the age of the complainant and the identity of the appellant. The only issue is whether there was penetration or whether the appellant touched the anus of the complainant with his penis. With respect to the evidence of penetration, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim or circumstantial evidence. This position is fortified by the holding of the court of appeal in **Martin Nyongesa Wanyonyi vs Republic Criminal Appeal no. 661 of 2010, (Eldoret), D. K. Maraga, J (as he then was), D. Musinga & A. K. Murgor JJA** citing **Kassim Ali vs.**

“The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence”

14. However, in John Mutua Munyoki vs. Republic [2017] eKLR, the Court of Appeal held that:

“Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt...The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition, there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration. Faced with similar situation, this Court in the case of Arthur Mshila Manga (supra) observed while allowing the appeal that:

‘But did the medical evidence on record establish that JM was defiled? We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3. No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the PW3 form as PEXI.’

The Court proceeded and stated that:

‘From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the Evidence Act, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.’

As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the Evidence Act aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant.”

15. In this case the clinical officer who examined the complainant did not find any evidence of penetration and the learned trial magistrate was right in not convicting the appellant on the main charge. While it is true that the absence of medical evidence to support the fact of penetration is not decisive as the fact can be proved by oral evidence of a victim or circumstantial evidence, where there is in fact medical evidence which does not conclusively prove penetration, that is a factor which may be taken into account in determining whether or not there was penetration.

16. The appellant was however convicted of the alternative charge of indecent act. Section 11(1) of the *Sexual Offences Act* provides that:

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

17. Section 2 of the *Sexual Offences Act* provides that “indecent act” means an unlawful intentional act which cause 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.

18. It therefore follows that for an offence of indecent act to be proved the ingredients necessary to be established by the prosecution are that the victim must be a child within the meaning of the provisions of the *Children Act*; there must an unlawful intentional act which cause any contact between any part of the body of a person with the genital organs, breasts or buttocks of another; and that the said act must have been committed by the accused.

19. The only evidence of any contact between the appellant’s genital organs and the anus of the complainant came from the complainant. In his evidence the complainant stated as follows:-

“He commanded me to lie on the bed. I refused. He picked a knife and threatened to kill me. I lay face down removed my clothes and penetrated my anus. I felt a lot of pain. I felt pain in my stomach. He kept at it till morning. He threatened to stab me if I screamed.

20. It is unfortunate that the learned trial magistrate adopted the use of the technical word “penetration” instead of what actually happened. As a result of the failure by the learned trial magistrate to use the exact words, it does not come out clearly whether the contact of the anus of the complainant was by part of the body of the appellant or something else. For the offence of indecent act to be committed, there must

contact between part of the body of the accused with the genital organs, breasts or buttocks of the complainant. It does not suffice to simply prove that there was contact with the genital organs, breasts or buttocks of the complainant.

21. Therefore, as a result of the failure by the prosecution to prove that there was contact between part of the body of the appellant with the genital organs, breasts or buttocks of the complainant, I agree with the concession of the appeal by the Respondent and find that the appellant's conviction was for that reason unsafe and cannot be sustained.

22. In the premises this appeal succeeds, the conviction of the appellant is hereby set aside, his sentence quashed and he is set at liberty unless otherwise lawfully held.

23. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 28th day of January, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey