



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 69 OF 2018

SM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. N. S Lutta, SPM delivered on 7.3.17 in Mariakani in Criminal Case No. 514 of 2016)

JUDGMENT

1. SM, the Appellant herein was tried and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act. The particulars of the offence were that on 30.4.16, at [Particulars Withheld] area in Mwatate Location, Kwale County, the Appellant intentionally caused his penis to penetrate the vagina of L M, (the Complainant) a female child of 16 years. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of this offence were that on the same day and in the same place, the Appellant intentionally caused his penis to touch the vagina of the Complainant. Following trial, the Appellant was convicted of the principal charge and sentenced to serve 15 years imprisonment.

2. Being aggrieved by the decision of the lower Court, conviction and sentence, the Appellant has appealed to this Court against both the conviction and sentence. The summarized grounds of appeal as set out in his amended grounds of appeal filed on 8.7.19 are that the trial Magistrate erred in fact and in law in that he:

- i) relied on the evidence of a single witness which was insufficient to justify a conviction.
- ii) failed to consider that the Appellant's right to information disclosure prior to taking plea as enshrined in Article 50(2)(j) of the Constitution of Kenya, 2010 was violated.
- iii) Failed to find that no cogent evidence was adduced to link him to the commission of the alleged offence.
- iv) Failed to adequately consider the Appellant's evidence and that Section 124 of the Evidence Act was not applicable in the case.

3. The Appellant urged the Court to allow the Appeal, quash the conviction and set aside the sentence.

4. In support of the prosecution's case, the prosecution called 5 witnesses. The Complainant testified that she recalls visiting her aunt. While there, she had sex on 30.4.16 with the Appellant who is her cousin, and she got pregnant. Later, the Complainant's mother suspected that she was pregnant and on questioning her, she disclosed to her what had happened. The Complainant was then taken to Samburu Health Centre and to the Police Station. A P3 form was issued. Thereafter the Appellant was arrested. The Complainant's mother PW2, MF, stated that the Complainant was 16 years old, having been born on 27.8.00. Upon suspecting that the Complainant was pregnant, she took her to the Samburu Health Centre where the pregnancy was confirmed. Upon the Complainant informing her that the Appellant, who is a cousin and neighbor was responsible, PW2 reported the matter to Samburu Police Station. PW3, Nasib Chirima Mwingo the Assistant Chief of Matumbi Sub-location stated that on 7.9.16, he received a letter from Samburu Police Station requiring him to arrest the Appellant. He arrested him and took him to Mariakani Police Station.

5. The prosecution led the medical evidence through the testimony of PW4, Rashid Omar, a clinical officer at Samburu Health Centre. He testified that he examined the Complainant on 6.9.16 and found her to be 18 weeks pregnant. He produced the P3 form which he had filled and signed. PW5, No. 55017, Sergeant Robi Kaverenge, the investigation officer, stated that the Complainant accompanied by her mother and grandmother made a report that she had been defiled. The Complainant told her she had had sex severally with the Appellant. PW5 recorded their statements and issued a P3 form. The Appellant was then arrested and taken to Mariakani Police Station and later to Samburu Police Station and was charged with the offence.

6. At the close of the prosecution case, the Appellant was found to have a case to answer and was put on his defence. In his sworn statement,

the Appellant stated on 7.6.16, he was at home waiting to take his college admission letter to the CDF office when PW3 came and took him to Mariakani Police Station. He was later taken to Samburu Police Station and charged with an offence he knew nothing about.

7. After setting out the evidence adduced before it, the trial Court in its judgment, found the Complainant to be a truthful witness. The Court also found that the prosecution evidence was consistent, corroborated and was not shaken by the Appellant's defence. The Court then proceeded to convict the Appellant on the principal charge and meted out a sentence of 15 years imprisonment.

8. The Appellant submitted that he was denied information disclosure prior to taking plea. As such, his right under Article 50(2)(j) of the Constitution of Kenya, 2010, was violated. He cited the case of *Adan v Republic* [1973] EACE 445 to support his submission. He argued that failure by the prosecution to supply him with witness statements prior to taking plea rendered the trial a nullity. For the Respondent, it was submitted that the Appellant was informed of the substance of the charge facing him in language that he understood.

8. In *Adan vs. Republic (1973) EA 445*, cited by both the Appellant and the Respondent, the Court of Appeal set out the steps to be followed by a court when taking plea as follows:

(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

10. At the stage of taking plea, the requirement is that the substance of the charge be stated and explained to the accused person in a language he understands. The record shows that when the Appellant was arraigned in Court on 9.9.16, there was interpretation from English to Kiswahili. The record further shows that the substance of the charge and every ingredient thereof were read over and explained to the Appellant in a language he understands. He responded "Si kweli" to both the principal and alternative charges.

11. The Court then directed that the Appellant be supplied with the witness statements and charge sheet. The fact that witness statements were given to the Appellant after taking plea did not in any way violate his right to full information or at all. The statements were supplied to him before the commencement of the hearing, thus according him sufficient time to prepare his defence and safeguarding his right to a fair trial.

12. On the ground that no cogent evidence was adduced to link him to the commission of the alleged offence, the Appellant submitted that the prosecution case was based on assumption and speculation. The medical examination done on the Complainant after 18 weeks is inordinately long and does not provide conclusive proof to connect him to the offence. A DNA test was necessary to link the Appellant to the offence. To the Appellant, there was no basis for the trial Court to believe that it was the Appellant who committed the alleged offence, in the absence of a DNA test to determine the paternity of the child. The allegation by the Complainant that the Appellant was responsible was not corroborated. Reliance was placed on the cases of *Rose Auma Otawa v Republic* [2011] eKLR and *Evans Wamalwa Simiyu v Republic* [2016] eKLR.

The Appellant argued that failure to conduct a DNA test to determine the paternity of the child rendered the conviction unsafe and unsustainable.

13. The Respondent submitted that the Complainant testified that defilement takes place in secret and the only witness in many cases is the victim. It was contended that the Complainant stated that it was the Appellant who defiled her and his identity is not disputed. Reliance was placed on the case of *Dennis Osoro Obiri v Republic* [2014] eKLR

14. Section 36(1) of the Sexual Offences Act empowers a Court to direct that an accused person be subjected to a DNA test to ascertain whether or not such person committed an offence as follows:

"Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

15. In *Evans Wamalwa Simiyu* case (supra), the Court of Appeal while noting that the fact of rape or defilement is not proved by way of a DNA test but by way of evidence, stated that the Court's power under Section 36(1) is discretionary and there is no mandatory obligation on the court to order DNA testing in each case.

16. The tenor in the case of *Dennis Osoro Obiri* (supra), is similar. The Court of Appeal stated:

“We do not see the reason why the principle should be different in a charge of defilement. The same view was repeated by this Court in GEOFFREY KIOJI VS REPUBLIC, Crim. App. No. 270 of 2010 (Nyeri) where the Court stated:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

17. The circumstances of this case are that the Complainant was defiled but did not disclose the fact of defilement at the time it happened. It is only after her mother took her to hospital on suspecting pregnancy and the pregnancy confirmed, that the Complainant said it was the Appellant who was responsible. According to PW4 who examined the Complainant, she was found to be 18 weeks pregnant. The fact of defilement is not disputed as the Complainant was indeed pregnant. Her age is also not disputed. She was a child of 16 years having been born on 27.8.00 as indicated in her clinic card. What is disputed is the identity of the person who defiled her.

18. It is to be noted that the offence was not reported or investigated at the time it occurred. The fact of the defilement only came to light when the Complainant's mother suspected that she was pregnant. The only evidence available as to the identity of the person who defiled the Complainant is that of the Complainant herself. All other evidence was hearsay as all other witnesses testified to what the Complainant told them. The Complainant was still pregnant at the time of the trial. In the absence of any other independent evidence implicating the Appellant, my view is that this was an appropriate case for the Court to exercise its discretion under Section 36(1) of the Sexual Offences Act. The trial Court ought to have waited for the Complainant to give birth to the child she was carrying whereupon a paternity test would have been performed to ascertain the culpability or otherwise, of the Appellant. Failure to do so has raised doubt in the mind of this Court as to whether it was indeed the Appellant who defiled the Complainant.

19. The case of Rose Auma Otawa case (supra) cited by the Appellant is not relevant as in that case the charge was defective and the Court ordered a retrial, which is not the case herein.

20. On the grounds that the trial Magistrate erred by relying on the evidence of a single witness, the Complainant, and failing to find that Section 124 of the Evidence Act was not applicable in the case, the Appellant submitted that the evidence of the Complainant alone was insufficient to warrant a conviction. It was further contended that even if Section 124 of the Evidence Act was to be relied on, the trial Court ought to have recorded its reasons for believing the Complainant. Failure to do so rendered the trial a nullity and the conviction unsafe. For the Respondent, it was submitted that the trial Magistrate was satisfied that the Complainant was telling the truth and her evidence was corroborated by the other witnesses.

21. Section 124 of the Evidence Act provides:

“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.”

22. Section 124 requires the corroboration of the evidence of a victim of an offence to secure the conviction of an accused person. In Anupchand Meghji Rupa Shah & another v Republic [1984] eKLR The Court of Appeal defined corroboration as:

“The correct definition of corroboration is that it is some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence.”

23. I have reevaluated the evidence adduced by the prosecution witnesses. I note that the Complainant is the only witness who implicated the Appellant. She stated:

“I do recall that on 30.4.16 I was at my aunts home where I had gone to visit. I then had sexual intercourse with the person called S.

On cross examination, she stated:

“It is true I had sex with you.”

24. The other witnesses who testified in support of the prosecution reported what the Complainant had told them. Referring to the Complainant, PW2 stated:

“She informed me it was S who had impregnated her”

On her part, PW5 stated in cross examination by the Appellant:

“The Complainant explained to me how you had sex severally.”

PW3 stated that that he received a letter from Samburu Police Station directing him to arrest the Appellant.

25. None of these prosecution witnesses adduced any independent evidence implicating the Appellant that would fit the definition of corroboration as set out by the Court of Appeal in the Anupchand Meghji case (supra). The trial Court thus relied on the evidence of one witness, the Complainant.

26. The criminal matter the subject of this Appeal involved the sexual offence of defilement. Under the proviso to Section 124 conviction can be based on the testimony of the victim only, of a sexual offence if the Court believes such testimony. The Court must however record the reasons for which it is satisfied that the victim is telling the truth.

27. In the impugned judgment, the trial Magistrate simply stated:

“The complainant testified before me and I found her to be a truthful witness.”

28. Although the trial Court stated that it found the Complainant to be a truthful witness, no reasons were recorded for drawing that conclusion. As such, the imperative of the proviso to Section 124 was not met.

29. The reliance on the uncorroborated evidence of the Complainant alone in the circumstances of the case, and failure by the trial Court to state the reasons for which it was satisfied that the Complainant was telling the truth, rendered the conviction of the Appellant unsafe.

30. In the end, and for the stated reasons the finding of this Court is that the prosecution did not prove its case beyond reasonable doubt. Accordingly, the Appeal is allowed, the conviction of the Appellant is quashed and the sentence imposed upon him is set aside. The Appellant is hereby set at liberty forthwith unless otherwise lawfully held.

DATED this 26th day of February 2020

M. THANDE

JUDGE

SIGNED and DELIVERED in MALINDI this 28th day of February 2020

NJOKI MWANGI

JUDGE

In the presence of: -

..... **for the Appellant**

..... **for the Respondent**

..... **Court Assistant**