



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 43 OF 2018

BEN MWANGI MUTETI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Malindi Criminal Case No. 29 of 2018

as presided over by Hon. Dr. Julie Oseko (CM) at Malindi Law Courts dated 23rd July 2018)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

JUDGMENT

The appellant's appeal to this court is against his conviction and sentence for the offence of defilement contrary to Section 8 (3) of the Sexual Offences Act.

- 1. That the Learned trial Magistrate erred in law and fact by failing to consider that the prosecution witness failed to prove their case beyond reasonable doubt.**
- 2. That the Learned trial Magistrate erred in law and fact by relying on the evidence of a single witness which was insufficient to warrant safe conviction.**
- 3. That the Learned trial Magistrate erred in law and fact by failing to consider that the sentence imposed to the appellant was manifestly harsh and excessive in all the circumstances.**
- 4. That the Learned trial Magistrate erred in law and fact by failing to consider that my defence was unchallenged.**
- 5. That the Learned trial Magistrate erred in law and fact by failing to consider that the prosecution case was contradictory in violation of Section 163 (c) of the Evidence Act.**

The subject matter of the charge was that on 12.4.2018 at [particulars withheld] Area, in Malindi Sub-County, the appellant intentionally and unlawfully caused his penis to penetrate into the vagina of **SMM**, a girl aged 4 (four) years old.

Based on these facts the prosecution called four witnesses to discharge the burden of proof, as stipulated in Section 107 (1) of the Evidence Act.

In this respect **PW1 Dr. Ibrahim** of Malindi Sub-County Hospital testified on behalf of **Dr. Rimba** who was the examining doctor and also filled the P3 form exhibit 1, on the positive findings as to the injuries suffered by the complainant. In his testimony PW1 told the court that the complainant vaginal examination showed reddish and tenderness on touch. Further, there were bruises and tears on the right and left labia majora. From the findings PW1 opined that the hymen was freshly broken.

In making the above observations, PW1, found that the complainant was actually defiled. He also produced treatment notes exhibit 2 and the laboratory results as exhibit 3.

PW2 SN the mother of the complainant testified that she got to know from her child (**G**) that someone had carnal knowledge with her in breach of the Law. In her evidence, PW2 told the court that the complainant gave a narration that she was sexually assaulted by the appellant. From the description given by the complainant, she was able to positively identify the appellant as the culprit to the commission of the offence. According to PW2, she took the complainant to the hospital and later reported the incident to the police.

PW3 GM testified that on 12.4.2018 she went home and found the complainant sleeping. That is when she learnt that the complainant had gone missing only to appear later complaining of having been penetrated by a person she was able to identify positively. PW3 gave evidence and added to the account given by PW2 that the complainant had been sexually assaulted by the appellant.

As a result of that and a quick physical examination of the complainant it transpired that credible evidence existed of defilement. The next course of action taken by PW2 and PW3 was to have a medical examination carried out which in their view showed signs of defilement. To this PW2 and PW3 sought a second opinion from the medical doctor.

PW4 CPL Mariam Hussein, of Malindi Police Station testified that on the material day of 13.4.2018 she received a defilement report involving the complainant. PW4 stated that among other assignments done was to issue a P3 form and record witness statements which formed part of the evidence tendered against the appellant.

From the facts set out by the prosecution the appellant was placed on his defence. It is clear that the appellant denied the charge and alluded to incident as having been fabricated by (**PW2**). The substantive issue raised by the appellant was to the effect that (**PW2**) had been pestering him to have a relationship but on careful consideration he was not willing to enter into any such kind of romantic affair.

Further, the appellant pointed out that in the month of April, he only saw (PW3) and the complainant at his doorstep as he marked exams. Thereafter, he was arrested and charged with the offence. The appellant therefore pointed out that grudge with PW3 was the cause of all his problems.

Submissions at Appeal

On appeal the appellant submitted that his fundamental rights under Article 50 (2) (J) of the Constitution were violated by the Learned trial Magistrate.

The appellant claimed that during the trial no witness statements were supplied to inform him of the charges as well as to enable him prepare for the defence. The appellant further submitted he participated at the trial without reasonable access to the crucial evidence being relied upon by the prosecution. In support of this, he cited the authorities of **Amos Karatu v R HCR Appeal No. 12 of 2006 EACA, Njeri Kathiani v R {2007} Eklr.**

Further, the appellant's contention was with regard to the evidence adduced by the prosecution through an intermediary without invoking Section 31 (7) of the Sexual Offences Act. The appellant's complainant was that the Learned trial Magistrate sought assistance from the evidence of a witness who did not qualify as an intermediary. The appellant also in his submissions challenged the evidence of the prosecution allegedly based on a grudge with the mother of the complainant (PW2), which was the cause of the charge.

The appellant further submitted that Section 19 (1) of the Oaths and Statutory Declaration Act Cap 15 was not adhered to by the Learned trial Magistrate. More significantly that there was no *voire dire* examination directed at the complainant as stipulated by the Law that children of 14 (fourteen) years and below be subjected to *voire dire* inquiry to establish their competency to give evidence on oath or unsworn at the trial. Quite properly the appellant relied on the following cases **John Muiruri v R {1983} eKLR, Samwel Ngugi v R {2012} eKLR, Patrick Kathuruma v R {2015} eKLR.**

Referring to the principles in the above cases, appellant urged this court to quash the conviction and sentence as being unsafe and unsustainable in respect to his guilt. It was appellant concern that the life imprisonment imposed by the trial Magistrate was excessive and punitive in the circumstances. To buttress this issue he relied on **Godfrey Ngotho Mutiso v R Cr Appeal No. 17 of 2008** and the recently decided case by the Supreme Court in **Francis Kariako Muruatetu v R {2017} eKLR** which dealt with such a situation on mandatory death sentence contrary to Section 204 of the Penal Code as being unconstitutional.

The respondent submissions on appeal

With regard to this particular appeal, Senior Prosecution Counsel, **Mr. Nyoro** submitted and opposed the appeal that the charge against the appellant was proved beyond reasonable doubt. The Learned senior prosecution counsel contended that on the defective charge sheet, there is no evidential material to show that the drafted information did not meet the test prescribed under Section 134 and 137 of the Criminal Procedure Code.

The Learned Senior prosecution counsel said that at the outset, the appellant was positively identified by the complainant. Counsel further asserted that there was no rebuttal put forth by the appellant against the watertight evidence given by the prosecution witnesses to proof the essential elements of the offence.

I have considered the evidence, submissions by both the appellant and the respondent. The question demanding for an answer is whether the appellant was convicted on the strength of the prosecution case or the weakness of his defence.

Secondly, whether there were instances at the trial which impacted negatively on the right to a fair trial under Article 50 of the Constitution.

Analysis and determination

The ultimate question to be determined by this first appellate court is whether conviction and the sentence was safe to be upheld by the court for the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act.

As a first appeal court, I am entitled to examine the evidence, to rehear the case, arrive at my own decision thereon without disregarding the Judgment of the trial Magistrate but carefully weighing it (see the principles in **Ruwala v R {1957} EA 370.**)

It is important from the onset that for the offence of defilement, the prosecution proves that there was penetration, proof of age of the complainant and that the appellant was positively identified and placed at the scene.

Under Section 2 of the Sexual Offences Act, the act of penetration is defined to mean either partial or full insertion of the male genitalia with that of female genitalia. The only defence the appellant may have in his disposal is where he had reasonable belief that the complainant female was eighteen or above maturity age as defined under the Childrens Act.

In this regard was there penetration in terms of Section (2) of the Act.

In the instant appeal the complainant evidence on sexual intercourse with the appellant was given by PW2. She further testified that on physical examination and explanation of the complainant it emerged to her and PW3 that she had been sexually assaulted. The medical examination by **Dr. Rimba** as stated by **Dr. Ibrahim** who testified on his behalf under Section 33 (b) of the Evidence Act adequately concluded that there was penetration to the vagina of the complainant.

According to PW1, the hymen was freshly ruptured and the left and right labia majora showed reddish and tenderness to touch. The above testimony of PW2 and medical evidence establishes an act of penetration as defined under Section 2 of the Sexual Offences Act. In my view sexual penetration as defined under Section 2 of the Act includes penetration of the vagina, anal orifice by the penis of a male offender.

In the instant case as a result of the prosecution evidence, it emerged that the appellant was implicated by the complainant. The evidence by the complainant was corroborated in a material respect that the alleged act of penetration occurred. From the medical P3 Form sufficient corroboration exist to support the element of defilement against the complainant. Through the testimony of PW2 alone without medical evidence could be held as sufficient and safe to convict the appellant so long as with reasons to be recorded that evidence. That is the requirement of the Law to the proviso of Section 124 of the Evidence Act.

It is therefore, trite that under Section 124 of the Evidence Act the element of penetration can be proved beyond reasonable doubt solely with cogent and credible evidence of the complainant. corroboration is not a mandatory requirement of the Law before a trial court can convict. The complainant evidence on the events leading to actual penetration is considered the best evidence to prove penetration. The doctors evidence is considered independent to that of the complainant on this aspect of penetration.

The next element in this appeal is on proof of age of the complainant. There has been consistence legal position by the superior courts on the importance of age on defilement cases.

In the case of **Hudson Ali Mwachogo v R {2016} eKLR** the court held:

“The importance of proving age of the victim of defilement under the Sexual Offences Act by cogent evidence cannot be gain said. It is no doubt that the age of the victim is an essential ingredient of the offence of defilement and forms part of the charge because the prescribed sentence is dependent on the age of the victim.”

In the present case PW4 the investigating officer drew to the attention of the court existence of a birth certificate of the complainant admitted as exhibit 8 to sufficiently proof that she was aged four (4) years during the commission of the offence. In this appeal there is no dispute as to proof of this element.

As regards identification the alleged incident took place within the neighborhood to PW2 house. The prosecution witness PW2 asserts that when they discovered the complainant had been defiled, a quick inquiry pointed at the appellant as the perpetrator. From the testimony, PW2, the complainant had confided in her that the appellant was the one who committed the sex act. That narration from the complainant as stated in court by PW2 involved a sequence of events and acts of penetration before she was set free by the appellant.

The court in considering this element will not lose sight to the settled principles on identification in the cases of **Abdalla Bin Wendo v R {1953} EACA 166, Mwaura v R {1978} eKLR, R v Turnbull {1976} 3 ALL ER 551.**

I have considered the evidence adduced in this case at the trial court. The primary evidence on identification was the evidence of the complaint as illustrated by PW2.

According to PW2 and PW3, the complainant had satisfactorily given a description on the circumstances that positively identified the appellant.

The appellant in answer to this evidence stated that all these was a fabrication due to the grudge between him and PW2.

It is on record that PW2 never interacted with the appellant before this incident involving her daughter. Thus alleged grudge with PW2 pursuing him to have an affair would not have been the cause to implicate him with such as a serious offence. Even so, the complainant in this case was not PW2 but her daughter of tender years who positively managed to point at the appellant as the person responsible for the offence.

In my view the issue cannot be equaled with the friendship between two adults a coincidence that a child of 4 (four) years old would otherwise falsely fabricate allegations of this nature against the appellant and give credible description on the sexual assault. The evidence of PW2 as an intermediary of the complainant cannot be faulted.

In **Baskerville v R {1916} 2 K. B. 658** the test on corroboration was laid down as follows:

“We hold that evidence on corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at Common Law or within that class of offences for which corroboration is required by statute. The nature of corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration except to say that corroborative evidence is evidence which shows or tends to show not merely that the crime has been committed, but it was committed by the accused.”

On this appeal, I am guided by the principles laid down in **R v Zieliski {1950} 34 CR Appeal R 193, R v Redpath {1962} 45 CR Appeal R 319** where in the later case the Chief Justice stated as follows:

“It seems to this court that the distressed condition of a complainant is quite clearly capable of amounting to corroboration of course, the circumstances will vary enormously and in some circumstances quite clearly no weight or little weight could be attached to such evidence as corroboration. Thus, if a girl goes in distressed condition to her mother and makes a complaint, while the mother’s evidence as to the girl’s condition may in Law be capable of amounting to corroboration, quite clearly, the jury should be told that they should attach little, if any weight to that evidence, because it is all part and parcel of the complaint. The girl reaching it all part and parcel of the complaint, might well put on an act and stimulate distress.”

The strength for the need of corroboration was succinctly stated by the Supreme Court of Uganda in **George Wilson Simbwa v Uganda CR Appeal No. 37 of 1995** where the court held that:

“Corroboration affects the accused by convicting or tending to connect him with the crime in other words it must be evidence which implicates him, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of corroboration the same whether it falls within the rule of practice at Common Law or within the class of offences for which corroboration is required.”

In this case, it’s clear the complainant appeared to PW3 terrified and distressed about the defilement. The injuries suffered to the genitalia as confirmed by PW1 was sufficient to also corroborate PW2 evidence that the complainant was defiled.

It is therefore consistent with the evidence that the complainant forced his penis into the vagina occasioning a rupture of the hymen and both right and left minor and majora, suffered both lacerations and tears.

Circumstantially, in the present case the foregoing ingredients of the offence were respectively proved by the prosecution in so far as defilement is concerned. The trial Magistrate convicted not only on the evidence of the complainant but on the thought of medical evidence.

Suffice to say that despite the fact of the victim not testifying it was fairly demonstrated that the evidence as to the identification of the appellant being at the scene of the crime cannot be faulted.

In confirming the existence or non-existence of a case proven beyond reasonable doubt against the appellant the court has to go through the minute details of the evidence. The decision by the Supreme Court of India in the case of **State of Punjab v Jagir Singh {1974} 3 SCC 277** held:

“A criminal trial is not like a fairy tale, wherein one is free to give flight to one’s imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. In arriving at the conclusion about the guilt of the accused with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts.”

As held in **Woolmington v DPP {1935} A.C.:**

“The alleged offence against an offender must be proved beyond reasonable doubt.”

This is a core component of our constitution that under Article 50 (2) (a) **“that every accused person has a right to be presumed innocent unless the contrary is proven. That inevitable burden of proof is vested with the prosecution in our criminal system of justice.”**

Therefore, even on appeal the weight of elements which point out the guilt of an appellant are measured heavily on the concept of proof of beyond reasonable doubt.

In the end, I agree with the founded principle in **R v Cooper {1969} 1 ALL ER 32 AL 34** where the court held:

“That an appeal court must in the end ask itself a subjective questions whether, we are content to let the matter stand as it is or whether there is not some lacking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such. It is a reaction which can be produced by the general feel of the case as the court experiences it.”

On the whole of the evidence adduced before the trial court, I am persuaded that the Learned trial Magistrate appraised the evidence correctly so to determine beyond reasonable doubt. That the appellant had sexual intercourse with the complainant. The issue that the appellant did have sex with the complainant was confirmed by the medical evidence.

The fact of freshly broken hymen of a complainant aged four (4) years old is a matter which settles the issue of corroboration and its importance to the commission of this offence.

In matters of violations of fair trial rights under Article 50 of the Constitution, I take a different view that there is no evidence which supports this ground of appeal.

The constitution is emphatic on the right to a fair trial which includes information and sufficient detail of the allegations and adequate time and facilities to prepare a defence.

It is commendable that the trial court insures the right to a fair notice of the charge, witness statements and adequate time to prepare for the trial though the Criminal Procedure Code has no provision specifying the nature of proper service and prescribed period. The requirement on compliance by the prosecution on this rights ought to be clearly indicated in the record of proceedings.

This will be in line with the principles in the fair administrative action in Article 47 of the constitution.

The fundamental importance of this right enables the accused to answer the charge and to secure the equality of Law under Article 27 of the Constitution. It is critical that evidence on the record be made obligatory that the accused has been given sufficient details of the charge and witness statements and facilities to prepare his defence.

In dealing with this issue on appeal, sometimes the trial record is sketchy as to the reasonable practicability that the appellant understood the nature of the offence and the details as alleged by the prosecution.

Like, the other concerns raised by the appellant perhaps this appeal would be incomplete without mentioning the ground to do with inconsistencies and contradictions in the prosecution case.

The Court of Appeal has explained the effect of inconsistencies of a witness evidence in the case of **Philip Nzaka Watu v R {2016} eKLR** that:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minute detail. Some discrepancies must be expected because human recollection is not in the fallible and no two people perceive the same phenomena exactly. The same way, indeed it has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

Raising this ground in his appeal the nature of it is in the form of a statement, but he denied the court the pieces of evidence which rightly appear in compatible with each other to render it impeachable under the rules of evidence.

It is not open to the appellant to just throw a statement to the court that the case is full of contradictions, the acceptable standard in an adversarial system of justice is to provide sufficient information and detail which serves as a notice for the adverse party to answer.

In absence of any other additional material, the evidence before the trial court considered carefully fails to present any glaring inconsistencies and contradictions that are necessarily fatal to the prosecution case. This ground of appeal is not available to the appellant.

Last but not least, the appellant has questioned the contents of the charge sheet or indictment. It is trite that under Section 134 and 137 of the Criminal Procedure Code. The charge sheet or indictment must contain sufficient information as a whole to inform an accused person of the essential elements of the offence charged.

The same legal position is also true that the failure not to frame the charge on account of particulars as stipulated in Section 134 and 137 of the Code does not mean the charge is a nullity and treated as void abinitio. The prosecution in drafting a charge should not include unnecessary words likely to confuse a reasonable accused person as to the nature of the indictment.

In reviewing the charge sheet complained of by the appellant there is no prima facie evidence that the Learned trial Magistrate required to have the information amended or to add any element of significance before final determination of the charge.

The omission purported to exist the framing of the charge is a defect which did not subvert the ends of justice or frustrate the defence in any way while preparing to answer the charge. Merely submitting that the charge is defective falls short of the threshold to occasion a finding of a fatal defect which goes to the root of the trial openly resulting in a failure of justice or prejudice to the appellant.

That was not the case in this appeal. The charge in question gave the appellant adequate notice both of the alleged facts and elements of the offence to permit him an opportunity to prepare his defence.

As a consequence, construing the provisions of Section 134 and 137 of the code, this ground on a defective charge lacks merit sufficient enough to have deprive the trial court jurisdiction to determine the issues at hand, though desirable as submitted by the appellant on appeal to this court it is clear that there was evidence to support the concurrent findings, on that basis the appeal is dismissed for lack of merit.

Sentence

The principles guiding interference with sentencing by the appellate is now well settled in the case of **Mokila v The State 135/11/2011 (ZA SCA 166)** The Supreme Court of South Africa held:

“It is well established that sentencing remains pre-eminently within the discretion of the sentencing court. This satisfactory principles implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court – in my view this includes the terms and conditions imposed by a sentencing court on how and when the sentences to be served.”

In addition, the case of **Shadrack K. Kogo v R (CR. Appeal No. 253 of 2003)** The Court of Appeal stated:

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere, it must be shown that the passing sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that some of these, the sentence itself is so excessive and therefore an error of principle must be interfered.”

According to Section 8 (3) of the Sexual Offences Act, the offence the appellant was convicted of and affirmed on appeal is punishable with life imprisonment. Based on the principles in the Supreme Court of case of **Francis Muruatetu v R {2017} eKLR** the mandatory sentence imprisonment for defilement was considered unconstitutional by the Court of Appeal. Decisions in **Jared Koita Injiri v R Kisumu CR Appeal No. 93 of 2014, Christopher Ochieng v R {2018} eKLR** the basis of Law for the appeal court to interfere with the sentence of the trial court impliedly from the dicta in **Muruatetu case**, would be the principle of parsimony.

“The parsimony principle is also aligned to the proportionate test in sentencing. It is my considered view that in line with parsimony principle the process of sentencing and final verdict should not be unnecessarily burdensome on offenders. Rather the severity – of a parsimonious sentence would ideally minimize gratuitous suffering of an offender in order to reflect society’s respect for liberty and physical integrity of the offender as a member of the public.”

See **Karl Warner** (Sentencing in **Tasmania, Federation Press {2002} Richard, S. Frust Just** sentencing. The principles and procedures for a workable system, **(Oxford University Press {2012})**. Taking into account the aggravating factors of this offence i.e. the age of the victim, the psychological trauma of the offence of a victim of tender years. The age of the offender comparable to the circumstances surrounding the defilement within the authorized boundaries of this case.

I find no mitigation which outweighs the aggravating factors. The conceptual core objective in criminal justice is to punish crime to deter the offender and protect society from such offenders with appetite to defile children of tender ages.

When determining the impact of this offence, the rights of the victim and public at large, vary the sentence of life imprisonment to a term custodial sentence of thirty (30) years against the appellant.

Fourteen (14) days right of appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF MARCH, 2020

.....

R. NYAKUNDI

JUDGE