



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL APPEAL NO. 123 OF 2018

GMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrates Court

at Kithimani delivered on 30.8.2018 by the Senior Resident Magistrate G.O. Shikwe

in Kithimani PMCC Criminal Case SO.46 of 2016)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

GMM.....ACCUSED

JUDGEMENT

1. This is an appeal from the judgment and sentence of **Hon. G.O. Shikwe SRM, in Criminal Case SOA No. 46 of 2016** delivered on **30.8.2018**. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006 wherein he was convicted and sentenced to serve twenty (20) years imprisonment.

2. The appellant was aggrieved by the said conviction and sentence and hence lodged the present appeal. The appellant’s case is three-fold. Firstly, that the prosecution did not prove its case beyond reasonable doubt. Secondly, that the charges were defective and finally that the trial court dismissed his defence of alibi. The appellant sought leave under Section 350 v of the Criminal Procedure Code where he added further grounds wherein he challenged his conviction for being based on evidence that was riddled with inconsistencies and finally averred that essential witnesses were not availed.

3. The appellant on the issue of a defective charge sheet submitted that he was charged under section 8(3) of the Sexual Offences Act and yet the victim was 12 years old. In addition, he submitted that no alternative charge was preferred and cited Section 179 of the Criminal Procedure Code. On the issue of proof of the prosecution case, the appellant submitted that vital witnesses were not called and placed reliance on the case of **Joseph Otieno Juma v R (2011) eKLR** and section 143 of the Evidence Act. The appellant added that the court did not interrogate the fact that there was an existing grudge. Reliance was placed on the case of **Elizabeth Waithiegeni Gatimu v R (2015) eKLR**. On the issue of contradictions, it was submitted that the victim did not state the date and time of the offence; he submitted that the same was major and went to the root of the case hence ought to be resolved in favour of the appellant.

4. The state opposed the appeal vide submissions dated 8.7.2019. Learned counsel addressed four issues namely: whether the charge sheet was defective; whether the prosecution evidence was marred with contradictions; whether the prosecution failed to call crucial witnesses and whether the prosecution proved the offence of defilement.

5. On the issue of a defective charge sheet, counsel placed reliance on section 134 and 382 of the Criminal Procedure Code and submitted

that the charge was specific; that the appellant understood the charge he was facing. On the issue of inconsistencies, counsel submitted that the litmus test is whether or not the same are material to the case. Counsel placed reliance on the case of **Philip Nzaka Watu v R (2016) eKLR** and added that the evidence of the witnesses could not be the same. On the issue of failure to call crucial witnesses, counsel submitted that the prosecution was not obligated to call a particular number of witnesses. On the issue of proof of the prosecution case, learned counsel submitted that penile penetration could not be established; reliance was placed on the case of **PKW v R (2012) eKLR**. It was submitted that the ingredient of penetration was not proven. Counsel conceded to the appeal and urged the court to find that the offence of indecent act with a minor was proven and that the appellant be convicted accordingly.

6. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. **PW1** was **SWM** who after a voir dire was conducted and the court was satisfied that she could testify on oath testified on oath that she was a class 6 student. It was her testimony that on 24th on a month she could not recall, the appellant came and offered her money that she refused; she recounted that the appellant came into her house and did bad manners to her whereupon she met Mama Purity whom she informed on what had happened. She testified that she briefed Faith what had happened and that she was taken to the hospital at Masinga. She told the court that she went to report to Masinga Police and was issued with a P3 form. She stated that the incident happened at 6 pm; that the appellant was an employee at Faith's house. She added that she thought she was born in 2003. On cross examination, she stated that the occurrence happened at 4 pm and later she changed to 5 pm. She testified that she met the appellant on the road when she was with Mama Purity.

7. **PW2** was **Pauline Ndunge Mutunga** who testified that on 24.9.2016 she was on her way home when she heard a girl crying and noted that it was Pw1 who informed her that M had defiled her. She told the court that she confronted the appellant who denied the same. On cross examination, she testified that she did not witness the defilement.

8. **PW3** was **Harrison Kyalo** who testified that on 24.9.2016 at 5.30 pm he was alerted by the cry of a child whom he discovered was Pw1. He told the court that on the following day, he recorded a statement.

9. **Pw 4** was **Edwin Mutembei**, a clinical officer based at Masinga Sub-county hospital. He testified of an examination that was carried out on 25.9.2016 on Pw1 aged 12 years who had a history of defilement on 24.9.2016 at 5 pm. He stated that he noted that the hymen was absent but could not tell if the same was freshly torn; he produced the P3 form and PRC form as well as the treatment notes as exhibits. The prosecution closed its case.

10. The court was satisfied that a prima facie case had been established against the appellant who was placed on his defence. He opted to give unsworn evidence. He testified that on 24.9.2016 he was at the house of Thomas Mulwa Musili for whom he had worked for 3 years and waited in the evening to be paid his salary arrears of Kshs 21,000/-. He told the court that Thomas promised to pay him the following day but however he was startled to be apprehended. He denied the charges and testified that he was only demanding for his money. He told the court that it was not true that the complainant was his employer's child.

11. The court found that all the elements of defilement were proven and as such there was sufficient evidence to convict the appellant of defilement. He was convicted of defilement contrary to Section 8(2) of the Sexual Offences Act and after considering the mitigation he was sentenced to 20 years' imprisonment.

12. Having looked at the appellant's and respondent's written submissions, the grounds of appeal and the evidence on the court record the following are the issues for determination:

- a. **Whether the prosecution had proved its case beyond reasonable doubt.**
- b. **Whether there were material inconsistencies in the prosecution case**
- c. **Whether the appellant was convicted on the basis of a defective charge sheet**
- d. **What orders the court may issue.**

13. It is trite law that in cases of defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

- a) *That the victim was below 18 years of age.*
- b) *That a sexual act was performed on the victim.*
- c) *That it is the accused who performed the sexual act on the victim.*

14. The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused and who is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See **Ssekitoleko v Uganda [1967] EA 531**). By his plea of not guilty, the appellant put in issue each and every essential ingredient of the offence of defilement with which he was charged and the prosecution had the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the appellant, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see **Miller v. Minister of Pensions [1947] 2 ALL ER 372**).

15. On the issue of proof of the prosecution case, the Appellant submitted that the prosecution did not prove its case. The prosecution opposed the appeal and submitted that the prosecution proved its case. A perusal of the list of exhibits in the trial court showed a P3 form dated 25.9.2016 as evidence of penetration in the names of **Pw1** that indicated that the victim had an absent hymen as well as an outpatient

record from Masinga Hospital in respect of Pw1. There is also a PRC form in the names of Pw1 that indicated that the hymen of Pw1 was absent. There is also an eye witness account of the incident by the victim who is the sole eye witness.

16. The trial court did not indicate the basis of its decision that there was penetration and this court cannot make any assumptions. The P3 form is indicative of penetration. However, this court is cautious of being fixated on the absence of a hymen as proof of defilement (See **PKW v R (2012) eKLR**).

17. It is the direct evidence of Pw1 that talks about the event. I am not satisfied that her account of events was free from error. I am taken a back that she could not remember her date of birth. Her evidence is not clear when she says “did bad manners.” I am not convinced that the unlawful sexual activity took place. In the case of **Mshila Manga v R (2016) eKLR** the court observed that under the proviso to section 124 of the Evidence Act for a conviction to be made the court ought to be satisfied that the witness was truthful and record reasons thereof.

18. From the evidence on record it was established that the appellant was at the scene of crime as the appellant admitted that he was waiting for his pay. I am not satisfied that there is direct or cogent evidence pointing irresistibly to the appellant as the defiler. From the record, there is no proof of age. It was crucial for the prosecution to present documentary evidence regarding the age of the complainant as the same was necessary for the purpose of sentencing at the tail end of the trial. The lack of evidence with regard to age weakened the prosecution case. I therefore resolve the 1st issue in the negative.

19. The appellant has assailed the prosecution case for being riddled with inconsistencies. I find that there is no inconsistency with regard to the elements of age as there is nothing to prove age; no inconsistency with regard to proof of the sexual activity as there is no proof of the same and no inconsistency as to the identity of the perpetrator as I am not convinced that the incident took place.

20. The appellant in his memorandum of appeal has assailed the trial court for failing to consider his defence. However, he did not set up any hence this ground raised by the appellant is of no merit.

21. On the issue of a defective charge sheet, this court would have to direct itself as to whether or not the charge sheet did not specify the offence with which the appellant had been charged: whether it did not give information as to the nature of offence charged and whether the appellant was prejudiced or the same occasioned any miscarriage of justice.

22. Section 134 of the Criminal Procedure Code provides as follows:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

23. The appellant noted that the evidence from the Pw1 on the time of commission of the offence was at variance. I have taken this into account. I find that the charge sheet set out the elements of the offence; the evidence on record was in tandem with what was indicated in the charge sheet and as a result the court was able to make a finding that the appellant had a case to answer. The appellant was present during trial, heard all the evidence against him and in my view there was no defect in the charge sheet as to go to the merits of the case. The appellant’s appeal on the ground of a defective charge sheet equally collapses.

24. The appellant has indicated that his conviction was based on a different section from the one he had been charged with and sentenced. I note he was charged under section 8(3) of the Sexual Offences Act and yet convicted under section 8(2). The said provisions are as follows:

“(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 12 and 15 years is liable upon conviction to imprisonment for a term of not less than 20 years.”

25. From the evidence on record the age of the victim has not been proven. section 382 of the Criminal Procedure Code provides, in material part that: *no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.* I find that the trial magistrate erred in convicting the appellant under section 8(2) of the Act and there was no evidence to support the element of age hence a miscarriage of justice occurred.

26. In view of the foregoing observations, the case for the prosecution was not proved beyond reasonable doubt and hence the conviction arrived at by the trial court was not safe. As regards the issue of sentence, I find the same now becomes moot as conviction cannot be sustained.

27. In the result, it is my finding that the appeal is meritorious. The same is allowed. The conviction is hereby quashed and sentence set aside. The appellant is ordered set at liberty forthwith unless he is otherwise lawfully held.

Orders accordingly.

Dated and delivered at Machakos this 23rd day of July, 2020.

D. K. Kemei

Judge