



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 1 OF 2020

C M.....APPELLANT

- VRS-

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. B. M. Kimtai (Mr.) – PM Keroka dated and delivered on the 24th day of December 2019 in the original Keroka Principal Magistrate’s Court Sexual Offence No. 59 of 2017}

JUDGEMENT

On 7th January 2020 the appellant was sentenced to imprisonment for a term of ten years for 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 9th January 2017 at [Particulars Withheld] village in Masaba North Sub-county within Nyamira County he intentionally caused his penis to penetrate the vagina of MM a child aged 17 years.

The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the alternative charge were that on 9th January 2017 at [Particulars Withheld] village in Masaba North Sub-county the appellant intentionally touched the vagina of MMM a child aged 17 years.

The petition of appeal has the following eleven grounds: -

“1. That the Learned Trial Magistrate erred in law and fact in convicting the appellant of the offence of defilement notwithstanding that the evidence before the trial court, when properly analyzed and evaluated, did not support conviction.

2. THAT the trial magistrate erred in law and fact by failing to afford the appellant a fair trial.

3. THAT the Learned Trial Magistrate erred in law and fact by not finding that the prosecution had not proved its case beyond reasonable doubt.

4. THAT the learned trial magistrate erred in law and fact in convicting and sentencing the Appellant on insufficient evidence.

5. THAT the conviction and sentence by the learned trial magistrate was unfair and unjust to the appellant.

6. THAT the learned trial magistrate erred in law and fact in putting the appellant on his defence without recalling the medical officer.

7. THAT the learned trial magistrate erred in law and fact in by giving a sentence which was harsh, excessive and not founded in law given that he never committed the alleged offence.

8. THAT the learned trial magistrate failed to appreciate that the prosecution case was riddled with contradictions.

9. THAT the learned trial magistrate erred in law and fact by failing to evaluate, analyze and appreciate that the medical evidence was not enough to sustain a conviction.

10. THAT the learned trial magistrate erred in law and fact by failing to order for mental examination.

11. The learned trial magistrate erred in law and fact by failing to evaluate and consider that the complainant's evidence did not specifically mention how, when and where the appellant defiled her."

The appeal which was vehemently opposed was canvassed by way of written submissions. Mr. Ogari, Learned Advocate for the appellant begun by submitting that the appellant must have been coached to give incriminating evidence otherwise her inner pants ought to have been produced as proof. Secondly he submitted that the prosecution left out crucial witnesses and gave as examples the clinical officer who was not recalled for cross examination as well as the siblings of the complainant. Counsel contended therefore that there were no independent witnesses and hence the charge against the appellant was not proved beyond reasonable doubt. Counsel further submitted that the trial did not meet the threshold of **Article 50 (2) (i) of the Constitution** in that the first report made to the police by the complainant was not supplied to the appellant. Citing the case of **Thomas Patrick Cholmondeley v Republic CRA No. 116/2007** Counsel urged this court to find there was no fair hearing. Counsel submitted that the trial was also unfair because the person who was called to produce the medical evidence was not the author. He contended that the appellant should also have been medically examined so as to link him to the offence. On the age of the complainant, Mr. Ogari submitted that the same was not proved although it is an essential ingredient of the offence. Counsel also faulted the trial Magistrate for failing to take into consideration that the P3 Form issued to the complainant was from Kisii Police Station instead of Keroka Police Station where the matter was investigated. Counsel submitted that the P3 was fabricated to fix the appellant due to a land dispute. Counsel wondered why the P3 Form was filled in a hospital other than the one where the complainant was treated.

In opposing the appeal, Counsel for the respondent submitted that all the ingredients of the offence were proved beyond reasonable doubt. Starting with age, Counsel submitted that the complainant's mother testified the complainant was seventeen years old and that in the P3 Form the clinical officer also stated the complainant was seventeen. To support her submission, Counsel relied on the decision of the Court of Appeal in the case of **Richard Wahome Chege v Republic [2014] eKLR** where it was held that a mother's evidence is the best evidence of age.

On penetration, Counsel submitted that the complainant testified that the appellant did bad things to her in the toilet. That it was her testimony that she was trying to put on her panty when the accused held her and she felt pain in her genitalia and that the appellant opened his zip. Counsel contended that evidence of identification was corroborated by the complainant's mother and the clinical officer. Counsel stated that their evidence was evidence of recognition; that moreover the incident occurred at 7am in broad daylight and the complainant knew the appellant well as they were cousins.

Regarding the sentence, Learned Prosecution Counsel submitted that the same was lenient given that the offence attracts a minimum sentence of fifteen years imprisonment. Counsel also urged that the trial Magistrate carefully considered and analyzed the evidence and accorded the appellant a fair trial. She contended that it was the appellant who chose not to cross examine the clinical officer and that even were that evidence to be expunged the charge would still have been proved. To support her submission, she cited the case of **Kassim Ali v Republic [2006] eKLR**.

As the first appellate court my duty is to reconsider and evaluate the evidence in the court below so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses who gave evidence (**see Okeno v Republic [1972] EA 32**).

The ingredients of the offence of defilement are **the age of the victim (that the victim is a child), penetration and identification of the perpetrator**. It is my finding that the age of the complainant was proved through her own testimony and that of her mother. My so holding is fortified by the decision of the Court of Appeal in the case of **Richard Wahome Chege v Republic [2014] eKLR** where it was held: -

"12. On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. Pw2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth. It is our considered view that the age of the complainant was not only proved by Pw2 but supportive evidence was given by Pw3 who examined the complainant and the complainant herself."

As concerns the ingredient of penetration my finding regrettably is that the same was not proved beyond reasonable doubt. The complainant testified as Pw2. Although the court allowed an adjournment so the complainant could testify through an intermediary as she is mentally handicapped, the record is silent on whether there indeed was an intermediary. That however is not the reason for my finding. My finding is premised on the complainant's testimony that she was just touched. Her exact words according to the typed proceedings of the lower court are: -

"I know accused, he is C. I was in the toilet when I heard someone touch me. I felt pain in my genitalia (touching). He did bad things to me. He came from the front. I was trying to wear my pantie when he held me. Accused had opened his zip. I went to hospital with my mother, she found me at the toilet. C hid behind the toilet. C is my cousin. There were no other people." (Underlining mine).

Nowhere in her testimony did the complainant allege that the perpetrator inserted his genital organ into hers yet **"penetration"** is defined as **the partial or complete insertion of the genital organs of a person into the genital organs of another person**. If he only touched her then the perpetrator committed an indecent act but not penetration. The evidence of the complainant's mother did not corroborate penetration either as it was her testimony that she arrived at the scene after the event. All she witnessed was the child lying in the toilet. As for the evidence of the clinical officer the same is to be expunged as he was not cross examined. The submission by Prosecution Counsel that it was the appellant who elected not to cross examine the clinical officer flies in the face of the record as it is evident that the witness was never recalled after being stood down. Moreover, the trial Magistrate's recording of the clinical officer's evidence in the absence of the Advocate for the appellant without giving any explanation for so doing was unfair as it violated the appellant's right to be represented by an Advocate (**see Article 50 (2) (g) of the Constitution**). My finding therefore is that whereas the evidence of the victim of a sexual offence does not require corroboration (**Section 124 of the Evidence Act**) and hence it was not necessary for the appellant to be medically examined

to link him to the offence, penetration was never proved.

On identification, Counsel for the respondent rightly submitted that evidence of recognition is more satisfactory, more assuring and more reliable as it depends upon the personal knowledge of the assailant in some form or other. My finding however is that there was no evidence to prove that the complainant recognized the appellant. It was her testimony that: -

“..... I did not see C at our home. As I was going to the toilet I did not see him in, I only heard him in the toilet. There was darkness. Our toilet is built using timber underneath and leaves on the side..... My mother came to the toilet. C rose and went to hid (sic) behind the toilet.....” (emphasis mine).

The question I ask myself is if there was darkness and she did not see C but only heard, how did she know he was the one? Identification of the perpetrator is a key element of the charge and it ought to have been proved beyond reasonable doubt. My finding is that taking the evidence as a whole it is also suspect that the complainant's mother saw the perpetrator. I say so because although she testified the offence occurred at 7am it is indicated in the P3 Form that it occurred at 7pm and indeed it could not have occurred at 7am only to be reported at 10.40pm. If the offence occurred at 7pm as indicated in the P3 Form and as reiterated in the testimony of the investigating officer (Pw4), both in examination in chief and cross examination, then either the complainant's mother was confused or was not a truthful witness or she should have been called upon to explain how she came to the conclusion that the person she saw was the appellant when it was dark. In my view the contradiction in the evidence of the prosecution witnesses regarding the time the offence occurred is in this case fatal to the prosecution's case. Any doubt arising therefrom must of necessity be resolved in the appellant's favour and my finding is that as the offence occurred at night which is consistent with the complainant's evidence that there was darkness, the complainant's mother should have disclosed how it is that she recognized that the person behind the toilet was the appellant. Was there any lighting outside or was it dark as the complainant said it was inside the toilet. If it was dark, then it means the circumstances did not favour accurate identification.

Further, the appellant mounted an alibi which was corroborated by his mother (Dw1) but which was ignored by the court which instead shifted the burden of proof to him. In my view that was a serious misdirection as it is always the duty of the prosecution, once an alibi is mounted, to dislodge it. In the case of **Wang'ombe v Republic [1976 – 80] 1 KLR 1683** the Court of Appeal stated: -

“When an accused raises an alibi as an answer to a charge made against him he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution (or police) ought to test the alibi wherever possible; but different considerations may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution.”

In the upshot I find that, although not for the reasons cited by Counsel for the appellant, this appeal has merit. Accordingly, the same is allowed, the conviction is quashed and the sentence of imprisonment for ten years is set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

Signed, dated and delivered in Nyamira this 24th day of September 2020.

E. N. MAINA

JUDGE

Judgement delivered virtually via Microsoft Teams