



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 112 OF 2017

CHRISTOPHER NZOLIO KIMUYA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal arising from conviction and sentence in Machakos Chief Magistrate's Court (Hon. C.K Kisiangani, RM as she then was), in Criminal Case No. 494 of 2015 and judgement delivered on 05.07.2016)

JUDGEMENT

Introduction

1. This is an appeal from the conviction and sentence of Hon. C.K Kisiangani Resident Magistrate in **Criminal Case No. 494 of 2015** on 5th July, 2016. The Appellant was charged with the offence of defilement contrary to Section 8(2) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

The Evidence

2. The Prosecution called 4 witnesses. Pw1 was JN. She testified that the complainant was her daughter and who was aged 10 years old. She testified that on 19.3.15 the complainant was sleeping with her legs wide open and on inquiry, the complainant informed her that the appellant had called her the same day at 5 p.m and took her into his house. The complainant was taken to Machakos General Hospital and the incident was reported at the Machakos police station and the chief's office. Pw1 presented the child health card and the P3 form in court.

3. Pw2 was the complainant. After a voire dire examination and the trial court was satisfied that the child understood the value of an oath and she was allowed to give sworn evidence. IKN testified that she was in class 4 and was 10 years old. She testified that she knew the appellant by name, and she identified him in court. She had seen him working at [particulars withheld] and he did farming. She testified that on the material day at around 5 pm she was coming from the toilet when the appellant came and held her and took her to his house that was near the toilet where there was no one else in his house. She testified that the appellant removed her pant and his and he inserted his penis in her private parts and then a man called N found him in the act. She did not tell anyone about it and that it was the third time that the appellant was doing it to her and he used to give her 5 shillings on each of these prior two occasions.

4. Pw3 was Dr. John Mutunga. He testified on the physical examination carried out on the complainant who alleged that she was defiled by a known person on 19.3.15. He testified that on examination the complainant had swollen private parts, bruised and swollen labia minora and majora and his conclusion was that she had been defiled. He filled in and signed the P3 form on 18.7.15. He also had the post rape care form that was filled on 19.3.15 that indicated that the complainant had swollen and bruised private parts, the hymen was intact and no spermatozoa was found. He produced the Post Rape Care form and the complainant's health card that indicate that she was born in 2005.

5. Pw4 was Pc Nancy Akumu an officer based at Machakos Police Station and she testified that on 20.4.15 at 2 p.m she was at work when the complainant came with her mother and reported a defilement by a known person. She issued a P3 form and visited the scene when the appellant was then arrested and charged. On cross-examination, she confirmed that the appellant's employer caught him in the act.

6. The Learned Trial Magistrate confirmed that the prosecution had established a prima-facie case against the appellant and put him on his defence. The appellant made a sworn statement. The appellant denied defiling the complainant and he stated that he saw the complainant on 19.3.14 when her mother had sent her to borrow Kshs 10/- from him and she gave it to her He testified that on the following morning, he went to work and on return he saw three people, one was the Assistant Chief, the other was the AP and the other was a village elder and the AP arrested him and took him to the police station. On cross-examination, he testified that he saw the complainant for the first time when he came to court and that she used to pass by where he worked. He testified that his employer was Charles Mutunga and who did not find him in the house with the complainant. He testified that on the material day, he was at work.

7. The trial court later sentenced him to life imprisonment on 5.7.2016. The Appellant then filed this appeal in which he challenges the

conviction and sentence.

Appellant's submissions

8. It is the appellant's case that the prosecution did not prove its case beyond reasonable doubt. It is also his case that age and penetration were not proved. He relied on the case of **Hillary Nyongesa v R (2010) eKLR**. In his submissions in reply to the respondent's submissions, he questions why the N who was quoted as having found the appellant in the act was never called as a witness and yet he was an essential witness. He cited the case of **Bukenya and Others v Uganda (1972) EA 549** and urged court to make an adverse inference. Further he submits that there are doubts and gaps in the prosecution evidence that should be resolved in his favour and therefore he should be acquitted. He cited the case of **Woolmington v DPP (1935) AC 462**.

Submissions by the state

9. The Learned Prosecution Counsel submitted that age was proved to the required standards by the evidence of the mother and the health card as well as the testimony of the doctor that the complainant was born on 1.6.2005. On the issue of penetration, this was established by the testimony of the complainant and corroborated by the evidence of the doctor who confirmed about the swollen private parts and that this evidence is not rebutted and it can be submitted that this is indicative of penetration as per Section 2 of the Sexual Offences Act. The state submits that the appellant has not raised sufficient reason to warrant interference with the decision of the trial court and therefore the appeal be dismissed for it lacks merit and the court uphold the conviction and sentence of the trial court.

Analysis

10. This being a first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyse the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses.

11. The court has carefully considered the petition of appeal and submissions presented. From the evidence adduced before the lower court, the pertinent questions to pose in this appeal, granted the Appellant's Grounds of Appeal as well as the Supplementary Grounds are:

a) Whether sufficient evidence was adduced before the lower court to prove the ingredients of the offence of Defilement to the requisite standard;

b) Whether the evidence adduced before the lower court proved beyond reasonable doubt that the Appellant was the perpetrator of the offence;

c) Whether there were any contradictions in the evidence before the trial court that would vitiate the conviction that was recorded against the Appellant.

a. Elements to be proved

12. In cases of defilement, the prosecution must prove:

was no one else in his house. She testified that the appellant removed her pant and his and he inserted his penis in her private parts and then a man called N found him in the act. She did not tell anyone about it and that it was the third time that the appellant was doing it to her and he used to give her 5 shillings on each of these prior two occasions.

17. The complainant's parent testified that the complainant was her daughter aged 10 years old. She testified that on 19.3.2015 the complainant was sleeping with her legs wide open and on inquiry, the complainant informed her that the appellant had called her the same day at 5 p.m and took her into his house. The complainant was taken to Machakos General Hospital and the incident was reported to the Machakos police station and the chief's office.

18. The appellant denied defiling the victim and he stated that on the material day he was at work and on 20.3.15 he was arrested.

19. From the account of the appellant he tasks the prosecution to place him at the scene of the crime on the material day.

20. From the foregoing, I did not have the benefit of seeing the witnesses testify, however from the proceedings and the court record, the trial court seemed satisfied with the evidence against the appellant. I hold a contrary opinion and find that the evidence on record is not sufficient to sustain a conviction for defilement.

b. Evidence of identification of the perpetrator

21. With regard to identification of the appellant as the perpetrator, the evidence of the complainant was that on the material day at around 5 pm she was coming from the toilet when the appellant came and held her and took her to his house that was near the toilet where there was no one else in his house. She testified that the appellant removed her pant and his and he inserted his penis in her private parts and then a man called N found him in the act. However the said N was not called as a witnesses thus the circumstances are not favourable for the positive identification of the appellant. In addition, the appellant's evidence indicated that on the material day he was at work thus he was able to challenge the evidence of the prosecution that he was confronted with as presented by the Complainant and her witnesses. In the circumstances, the prosecution ought to have removed any form of doubt that the appellant was the perpetrator.

22. From the evidence, I am unable to find that all the three critical ingredients for the offence of defilement that is: age and penetration and identity of the accused have been met. I think that the learned magistrate ought not to have been confident of the strength of the prosecution case against the appellant. I find that there is insufficient evidence on record to sustain a conviction against the appellant who due to the evidence on record has been not been placed at the scene of the crime on the date in question. The conviction of the appellant was therefore unsafe.

c. On whether there were any contradictions in the evidence in trial court that would vitiate the conviction that was recorded against the Appellant:

23. Section 382 of the Criminal Procedure Code provides that the litmus test is the prejudice occasioned, and the case of **Philip Mzaka Watu v R (2016) eKLR** that states that inconsistency may demonstrate veracity and credibility.

24. Though the appellant has not raised this ground, I have perused the lower court record and there appears to be several contradictions in the prosecution evidence that test the credibility of the witnesses and the value of the evidence therein.

*a. **The evidence on the date the report was made to the police-** Pw1 states that she made the report on 19.3.15 to the Machakos police station, however, Pw4 confirms that the report was made on 20.4.15, almost a month later.*

*b. **The evidence on the report to the hospital-** Pw1 states that she reported the matter to Machakos General Hospital on 19.3.15. The only evidence on record as to the examination carried out on the complainant is a PRC form that indicated that her hymen intact. There is no other medical report that indicates that the complainant visited Machakos general Hospital.*

*c. **PW.3 filled P3 form on 18/07/2015 no explanation for such a long delay almost four months.***

25. Clearly therefore, the contradictions in the evidence that was relied on by the trial court go to the root of the case and cast doubt as to whether the complainant was ever defiled in the first place. Similarly, the said contradictions even create doubt as to the truth contained in the allegations made by the complainant and her parent. In this regard I find that prejudice suffered by the appellant as a result of the contradictions that go to the root of the case do affect his conviction.

The sentence

26. The evidence on record shows that the appellant was convicted to life imprisonment, however in light of my observations above there is no need to delve into the issue of sentence.

Determination

27. In the result, I find that the prosecution did not prove its case beyond all reasonable doubt. The appeal is allowed, the conviction quashed, the sentence set aside and the appellant is at liberty unless lawfully held.

It is so ordered.

Dated and delivered at Machakos this 30th day of January, 2019.

D.K KEMEI

JUDGE