



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 66 OF 2017

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 65 OF 2017

KOMU KAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Mutomo Senior Principal Magistrate's Court Criminal Case (S.O.) No. 10 of 2017 by Hon. S. K. Ngii S R M on 05/12/17)

JUDGMENT

1. **Komu Kambua**, the Appellant, was arraigned in Court and accused of having defiled a child aged **13 years old**. He was taken through full trial, convicted and sentenced to serve **twenty (20) years imprisonment**.
2. Aggrieved, he appeals against the conviction and sentence on grounds that: The defence put up by the Appellant was dismissed without any consideration; the age of the Complainant was not adequately established; medical evidence adduced was not sufficient; selective bits of evidence were applied; and the fact that the Appellant was a minor was not considered.
3. Facts of the case were that on the **28th day of July, 2017** the Complainant was fetching firewood when the Appellant approached her and asked for her 'thing'. As she wondered what he meant, he wrested her, pulled off her pant and violated her sexually. As a sign of gratitude he carried for her firewood. As they walked on he saw her sister, dropped the firewood and ran away. PW2 **MK** the sister of PW1 confronted her and she explained what had befallen her. They went to the home of the Appellant and confronted him and took him to the police station. He was arrested and subsequently charged.
4. When put on his defence the Appellant stated that he was framed up. He testified that on the material date the Complainant passed through their farm and asked him to help her carry firewood which he did. He denied knowing her previously or being her friend. He argued that the Complainant was not examined and she had many other boyfriends who could have slept with her. That when she got pregnant and was questioned by her teacher she mentioned other people and not him.
5. Directions were given in the matter where the Appeal was disposed by way of written submissions.
6. The Appellant urged that the case was not proved to the required standard and the cogent defence put up was not given any consideration.
7. The Respondent/State through learned State Counsel **Mr. Mamba** reiterated what each witness stated and argued that the sentence imposed was the minimum sentence prescribed under the Act.
8. This being the first Appeal, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32)**.
9. This having been a case of defilement, the Prosecution was duty bound to prove:
 - (i) The age of the Complainant.
 - (ii) The act of penetration.

(iii) The positive identification of the perpetrator of the act.

10. In the case of **Moses Raphael vs. Republic CRA No. 169 of 2014 (2015) eKLR** the Court of Appeal stated that:

“On the challenge posed by the uncertainty in the complainant’s age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanja v. R, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child’s age cannot therefore assist the appellant to avoid criminal culpability.”

11. In the case of **Mwalengo Chichoro Mwajembe vs. Republic Criminal Appeal No. 24 of 2015 (UR)** the Court of Appeal stated that:

“... the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa-Vs- Republic, Criminal Appeal No.19 of 2014 and Omar Uche -Vs- Republic, Criminal Appeal No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda, Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable...”

12. In her testimony the Complainant stated that she was **thirteen (13) years old** and a pupil in standard 5. PW3 N M her mother stated that she was **13 years old** and adduced in evidence a Child Health Card. PW7 **Doctor Zainabu Mamdaani**, a Dental Officer of eight (8) years experience did an age assessment of the Complainant. An X-ray was done and she was also examined physically. It was established that her second molar had erupted, and the root was fully formed. She confirmed that the child’s age was **13 years**. These was undisputed evidence that the Complainant was indeed a child.

13. The Prosecution adduced evidence that the Complainant was violated sexually. It was the Complainant’s evidence that a penis was inserted in her genital organs on the **28th July, 2017**. The Complainant was seen at a private hospital the following day. PW5 **No. 101007 PC (W) Lydia Njege** the Investigating Officer explained that the matter was reported to the station at night, and the following day was a weekend when the public health centre was closed. Therefore she personally escorted the Complainant to Ikutha Medical Clinic. Treatment notes from that particular clinic were adduced in evidence.

14. It is urged by the Appellant that there is a variance between the date on the treatment notes and the date per evidence of the Complainant. The Complainant stated that the act was perpetrated on the **28th July, 2014**. The matter was reported to the police at night and the Complainant was escorted to the clinic on the **29th July, 2014** the following day. No variance as alleged is noted.

15. Subsequently the Complainant was examined by PW6 **Ruth Mutinda** a Clinical Officer at **Mutomo Health Centre** who confirmed that the Complainant’s hymen was partially torn and there was laceration on the labia. She found that the child had been defiled. It is further contended that all other witnesses did not testify that they were accompanied to hospital by the police officer. In the case of **Alfred Twehangane vs. Uganda, Criminal Appeal No. 139 of 2001, [2003] UGCA, 6** it was stated that:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

16. Indeed other witnesses’ evidence was silent on the fact of the police officer having escorted the Complainant for treatment but that would not dislodge the fact that she was examined at a clinic as the treatment notes were not dismissed as having not been authentic.

17. It is also urged that following examination carried out it was found that “the hymen and vaginal orifice look partly torn but no traces of blood seen”. It was therefore submitted that “looking partly torn” does not mean really torn.

Section 2 of the **Sexual Offences Act** defines penetration as:

““penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;”

Being partly torn is evidence of penetration whether partial or complete having occurred. In the premises the element of defilement was present.

18. The Complainant identified the Appellant as the perpetrator of the act that caused penetration into her genital organs using his genital organs. It was her evidence that after the Appellant committed the act he promised to carry for her firewood which he did. But on reaching near a certain borehole he saw her sister, PW2, dropped the firewood and ran away.

19. PW2 stated that when she sent the Complainant to pick firewood she delayed to return. And as she went to fetch water at the borehole she saw the Appellant carrying firewood walking ahead of the Complainant. When he noticed her he dropped the firewood and walked away. Her evidence corroborated the evidence adduced by the Complainant that the Appellant carried for her the firewood.

20. Right at the outset, the Complainant told her sister that she had been defiled by the Appellant. In his defence the Appellant denied knowing the Complainant but he stated that on the material date the Complainant passed through their home and asked him to carry for her firewood and he agreed to do it. He went on to state that the Complainant had many boyfriends who may have slept with her. And when she got pregnant and was asked by the teacher she mentioned other people but not him.

Section 309 of the **Criminal Procedure Code** provides thus:

“If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”

21. This was a case where the Prosecution should have acted pursuant to the alluded to provision of the law so as to rebut evidence adduced but it was not done. Therefore the allegation remains uncontroverted.

22. In dismissing the defence put up by the Appellant the trial Magistrate believed the Complainant. He stated thus:

“The Appellant was firm in her evidence and one maintained and displayed consistently both in her demeanour and testimony and at no time did she display even in the minimest any resistance of malice or ill feelings against the accused person for which reasons, I believe and accept her testimony as truthful in so far as the act of coitus between herself and the accused is concerned.”

23. When the act of penetration was perpetrated against the Complainant she was alone. The proviso to **Section 124** of the **Evidence Act** provides thus:

“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.”

24. In the case of **Kibageny Arap Korir vs. Republic (1959) EA 92** it was stated that:

“There is no definition in the oaths and Statutory Declarations Ordinance of the expression ‘Child of tender years’ for the purpose of section 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age of under fourteen years.”

This is a case where no *voire dire* examination was conducted to establish if the child understood the meaning of oath or the duty of speaking the truth. Therefore whether she told the truth or not was a matter that was not interrogated by the Court. This was explained by the Court of Appeal in the case of **Muiruri vs. Republic (1983) KLR 445** thus:

“The matter whether a child is of tender years or not is a matter of the good sense of the court where there is no statutory definition of the phrase. In Kenya there is no statutory definition of the expression “child of tender years” for purposes of section 19 of the Oaths and Statutory Declarations Act (Cap 15).”

25. It is also urged that the Appellant was a child aged **16 years**, therefore a minor. That he adduced in evidence a document that was disregarded by the Court. Further that the Assessment Report adduced in his regard was suspect because unlike that of the Complainant, X-ray films taken were adduced in evidence but for the Appellant it was mere allegations.

26. The learned Magistrate has also been faulted for having shifted its position from a neutral arbiter to a biased referee with a mindset of arriving at a particular verdict. That he took upon himself to assist the Prosecution case therefore grossly prejudicing the rights of the Accused who was not represented by Counsel. In particular having called other witnesses that it referred to as “Court Witnesses”.

27. In her testimony PW5 the Investigating Officer stated thus:

“I also made efforts to ascertain the age of the accused person. I just got a child health card, for the accused which appeared to have been altered with respect to the inside of the card. It appeared that the name John had been put thereon particularly. There’s also grey areas with some other entries. I went to Ikutha at a hospital in which the mother claimed to have given birth. I established that the card had been issued to one Francis and not John...”

This particular witness was not the author of the document. Some two (2) witnesses testified, **Jeremiah Kasomo Masila** and **Anthony Nzioki Mulwa**, that the learned Magistrate referred to as “Court witnesses No. 1 and 2” respectively.

No reasons are recorded that prompted the Court to call them and why they were referred to as Court witnesses. **Jeremiah Kasomo Masila** introduced himself as a Director of **Ikutha Nursing Home** who testified that the **Child Health Card** that bore the name **John Komu** originated from his health facility but there was a notification of birth that bore the name **Francis Komu** a child who was born on the **26th**

January, 2001 a date that was indicated on the Child Health Card.

In her testimony PW7 did not state where exactly she got the Child Health Card from and if the name was altered who could have done it. That particular card indicated the age as **16 years**.

28. **Section 150** of the **Criminal Procedure Code** provides thus:

“A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

29. As aforesaid, no reasons were recorded indicating circumstances in which the witnesses were called therefore this was prejudicial to the Appellant.

30. From the foregoing it is evident that it was unsafe to convict the Appellant. The Appeal succeeds. The conviction is quashed and sentence meted out, set aside. Appellant shall be released forthwith unless otherwise lawfully held.

31. It is so ordered.

Dated, Signed and Delivered at Kitui this 29th day of January, 2019.

L. N. MUTENDE

JUDGE