



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CRIMINAL DIVISION
CR. APPEAL NO. 77 OF 2017

JAMES MAINA MUNENE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 2300 of 2010 delivered by Hon. Kithinji A. R.,SPM on 28th June 2017).

JUDGMENT

Background.

1. The appellant was charged with a main charge of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. It was alleged that on 7th June, 2010 at Kariobangi North within Nairobi County, unlawfully an intentionally committed and act which caused penetration of his penis to vagina of AN a child aged 9 years. In the alternative count, he was charged with committing an indecent act with a minor contrary to Section 11(1) of the Sexual Offences Act in that he intentionally and unlawfully committed an indecent act with AN aged 9 years by touching her vagina.

2. The appellant was convicted of the main charge and sentenced to serve 21 years imprisonment. Dissatisfied with both the conviction and sentence, he preferred the present appeal. He set out nine grounds of appeal. They were that the learned trial magistrate erred in law and fact, (i) in finding the that the prosecution had proved its case beyond reasonable doubt; (ii) in failing to find that the elements of penetration and age had not been proved; (iii) in failing to find that the prosecution's case was marred with irreconcilable contradictions; (iv) in failing to comply with the provisions of Section 200(1) of the Criminal Procedure Code (v) in failing to find that crucial witnesses necessary to prove the case of the prosecution were not called; (vi) in failing to comply with Section 19 of the Oaths and Statutory Declarations Act; (vii) in failing to find that medical report was adduced into evidence by a person other than it's maker; (viii) in failing to find that crucial exhibits were not adduced into evidence and (ix) in failing to consider the defence of the appellant.

Submissions

3. The appellant was represented by Professor Hassan Nandwa. Counsel for the appellant filed written submissions and highlighted the same. He argued that the elements of the offence were not proved. On penetration, he noted that the prosecution adduced insufficient and contradictory evidence in respect of the medical reports which ought to demonstrate and corroborate the witness testimonies given. He pointed to the P3 form which he argued did not support penetration. He further submitted that the medical report from Nairobi Women's hospital was adduced by a person other than the maker. He added that the complacency of the parents in taking their child to receive medical treatment points to a different sequence of events. He also submitted that crucial evidence was missing namely the clothing that was used on the material day.

4. On age, counsel argued that there was no demonstration that the victim was indeed a minor of nine years. He argued that the age was a crucial aspect that must be conclusively proved because punishment in sexual offences is determined by the age of the victim (**see Hillary Nyongesa v Republic [2010] eKLR**). The fact that there was no age assessment report nor a documentation to support the claim of age was a testimony that the offence was not established.

5. Counsel submitted that there was a violation of Section 200(1) of the Criminal Procedure Code Cap 75. The trial having commenced under the hand of T. Mwangi SRM after hearing of the first three prosecution witnesses the matter proceeded before E K. Nyutu Ag. PM who informed the advocate of the accused of the right under Section 200(1) of the Act. The court then proceeded to hear the testimonies of the last two witnesses. Counsel argued that the duty owed is to the accused and not his counsel to elect on how the case should proceed after a succeeding magistrate takes over the conduct of the trial. He referred the court to the cases of **Cyrus Muriithi Kamau and Another v Republic [2007] eKLR**, **Rebecca Mwikali Nabutola v Republic[2012] eKLR**, **David Kimani Njuguna v Republic Criminal Appeal**

294 of 2010 and W S v Republic[2016] eKLR.

6. Professor Hassan argued that essential witnesses were not called this being teacher J and the shopkeeper. On this he argued that failure to call a vital witness leads the court to find that the witness bore information unfavorable to the prosecution. He cited the case of **Paul Kamau Muriithi v Republic [2017]** eKLR to buttress the submission.

7. He also cited the failure of the requirements of Section 19 of the Oaths and Statutory Declarations Act. He noted that the *voire dire* examination that was conducted did not help establish that the minor understood the meaning, nature or solemnity of an oath. As such the affirmation done by the court was nugatory.

8. Finally, counsel submitted that the Appellant's defence was not considered. He argued that the trial court did not interrogate the allegation that a grudge existed between the warring parties.

9. Ms Atina for the Respondent submitted that all elements of the offence of defilement were established. She submitted that penetration was established by the medical reports which corroborated the witness account by PW1. She noted that though the hymen was intact that did not negate the assertion that penetration did occur, as the same could either be partial or full. On age of the victim, counsel submitted that the medical report from Nairobi Women's Hospital confirmed that the victim was born in 2007 which placed her age at nine years as at the time of the offence. As to the identification of the Appellant, counsel submitted that the same was established by first the identification of the Appellant at the police station and secondly by identifying the house in which the appellant defiled the minor.

10. Counsel argued that the Section 200 (1) (3) (4) of the Criminal Procedure Code was complied with as the appellant was represented by an advocate who informed the court how the case would proceed. She added that all necessary witnesses required to establish the prosecution case were called.

11. Counsel also argued that the *voire dire* examination was properly conducted and the court affirmed PW1 although she was not sworn. On sentencing, she argued that the trial court issued an improper and illegal sentence which illegality she urged this court to correct.

Evidence

12. **PW1, AN** aged 9 years was affirmed in *voire dire* and gave an unsworn statement. She narrated the events of the 7th June 2010 at Kariobangi within Nairobi County. She testified that she was sent to the shop to buy sugar. After the purchase a man called her and told her he intended to send her to that shop for cooking oil. He took her hand and led her upstairs where he proceeded to defile her. He removed her clothes and tore her underwear with a blade. She testified that she felt pain and wanted to scream but the perpetrator warned her. He threatened her with death. He let her go she took the sugar and went home. She stated that there were no houses around the one where the perpetrator took her. She further noted that she went to bed but began bleeding from her vagina before she could sleep. She disclosed to her teacher about incident.

13. **PW2, HN** was the mother to PW1. Her testimony was that on the 7/6/10 she sent her daughter to the shop. After realizing her daughter had stayed out long she went to look for her. She met PW1 at the gate of their building. On enquiring from her why she was late, she told her that the shop was full of people. She slept without eating and left for school the next day. Later in the day she was sent back home complaining of a stomach ache. PW1 opened up to her father that she was bleeding from her genitalia. PW2 took PW1 to hospital 9/6/10. The witness identified the medical report from Nairobi Women's Hospital, and a P3 which was adduced as Exhibit 2 in evidence.

14. **PW3, JNG** the father to PW1 confirmed that indeed PW1 was sent from school on 7/6/10. The latter then informed the witness that she was bleeding from her genitalia. She explained she could not report the incident immediately as the assailant had threatened her with death. He apprehended the occupant of the house that his daughter had pointed to him the defilement took place.

15. **PW4, Dr. Zephaniah Kamau** of Police Surgery examined PW1 on 24/6/10. He noted that there were residues consistent with bruising. He produced P3 form as P Exh. 2. **PW5, PC Merceline Ngonje** was the investigating officer. She summed up the prosecution case and preferred the charges against the Appellant. She also adduced the medical Report from Nairobi Women's Hospital as P.exh 2.

16. **DW1**, the appellant gave a sworn defence. He stated that he was arrested on suspicion of defilement. He called one witness **DW2, Joyce Nyambura** who stated that there was a dispute between her and the father of PW1, instigated the arrest of the appellant.

Determination

17. After considering the evidence on record and the respective rival submissions, I have isolated three issues for determination. They are, whether the prosecution had proved its case beyond a reasonable doubt, whether the appellant's defence was considered and whether the provisions of Section 200(1) of the Criminal Procedure Code Cap 75 were complied with, and whether Section 19 of the Oaths and Statutory Declarations Act was complied with.

18. On proof of the case, the prosecution was enjoined to establish three ingredients, namely Identification, penetration and age of the minor. The prosecution presented five prosecution witnesses and documentary evidence in the form of medical reports to substantiate the allegation.

19. PW1 who was the victim along with PW2 and 3 confirmed that indeed the victim went to the shop on the evening of 7th June, 2010. Secondly. The latter witness testimonies indicated that PW1 stayed out longer than anticipated and being anxious PW2 went to look for PW1. PW1 testified that a man took her to his house and defiled her after which she went home. PW4 and PW5 produced into evidence a P3 form and medical report. These reports, though two weeks apart, corroborated the fact that there was defilement.

20. The medical report noted that there was discharge consistent with infection occasioned by defilement, the P3 form that was two weeks old indicated that there was residue consistent with bruising on the genitalia. It is made clear that the assertion that there was penetration was substantiated by the oral and documentary evidence of the prosecution.

21. As to proof of the age of the victim, although no primary documentary evidence was adduced, it is trite that the age can be demonstrated by a doctor or a professional in the field. (See **Joseph Kieti Seet v Republic [2014] eKLR**). In the instant case, the medical report from Nairobi Women's Hospital indicated that the age of the minor to be nine years. This is corroborated by the testimony of the second prosecution witness.

22. The appellant was identified by the circumstance, that he was the occupant of the house that was pointed out by PW1 as the place where the defilement took place. This was done twice on different instances by PW1 a child of tender years. This fact was confirmed by PW3 and PW5. This was conclusive proof that in the absence of another male adult occupying the house that the appellant was positively identified by circumstantial evidence. The three elements of the charge were properly established. This leads this court to conclude that the prosecution did indeed prove their case beyond a reasonable doubt.

23. The argument that a witness was not called cannot be sustained. There is no fixed number of witnesses that ought to be called (Section 143 of the Evidence Act). Of importance is that the witnesses called establish the case to the required standard.

24. The appellant's defence did not in any way shake the case of the prosecution. It fell short of disproving any of facts and law brought up by the prosecution. On the allegation that a grudge did exist, it appears to be too remote a possibility that it could affect or in any way occasion break the sequence of the events. The defence was ably considered.

25. The appellant argued that Section 200(1)(3) of the criminal code was not complied with. However, he was ably represented by an advocate who informed the court how his matter would proceed. The argument that only the accused should speak in court is not plausible and is not based on any law.

26. As regards whether **Section 19 of the Oaths and Statutory Declarations Act** was complied with, the same provides that a child with sufficient intelligence and knows the weight of truthfulness may have their testimony admitted in court. It is not a mandatory requirement that the child should be sworn or asked specific questions. The test is that the questions asked must meet the threshold set out under the provision. In the instant, PW1 understood the need to tell the truth consequent which she was directed to give an unsworn statement. Accordingly, the assertion that a proper *voire dire* examination was not conducted merely because she was not sworn is unfounded.

27. In conclusion, I find that the case was proved beyond reasonable doubt. In totality the court finds that this appeal has no merits and the same is dismissed. I accordingly uphold the conviction.

28. On sentencing, the Appellant was sentenced to 21 years imprisonment. Section 8(2) of the Sexual Offences Act is couched in mandatory terms such that any person who commits the offence of defilement with a child aged eleven years or less shall be sentenced to life. The Appellant was duly warned of the likelihood of enhancement of the sentence. The trial court clearly imposed an illegal sentence. This court must, as its duty correct this illegality. Accordingly, I set aside the 21 years jail term and substitute it with an order that the Appellant shall serve life imprisonment. It is so ordered.

Dated and Delivered at Nairobi this 26th February, 2019.

G.W.NGENYE

JUDGE

In the presence of:

1. *Appellant in person.*
2. *Miss Sigei for the Respondent.*