



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.122 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. D. Ogembo - CM delivered on 25th August 2016 in Nairobi CMC. CR. Case No.760 of 2014)

HASSAN ABDULLAHI RASHID ALI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Hassan Abdullahi Rashid Ali was charged **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 unknown dates between the months of June 2013 and 9th April 2014 within Nairobi County, the Appellant intentionally caused his penis to penetrate the vagina of TW (the complainant), a child aged eight (8) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial magistrate for failing to evaluate the evidence and therefore reached the erroneous determination that he was guilty as charged. He was of the view that the evidence adduced by the prosecution failed to muster the required threshold to establish the charge to the required standard of proof beyond any reasonable doubt. The Appellant faulted the trial magistrate for convicting him on the basis of a defective charge sheet. He was of the view that he was charged with an offence unknown in law. In particular, he stated that he was charged with an offence that was not provided in the **Sexual Offences Act**. He was finally aggrieved that he had been convicted despite the fact that the prosecution's evidence was riddled with inconsistencies and contradictions. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. In the submission, he stated that whereas it was alleged that he had defiled the complainant, a child aged eight (8) years, he was charged under **Section 8(4)** of the **Sexual Offences Act** which refers to the age of the victim as between 16 and 18 years. He complained that he was hampered in effectively defending himself in the case because the particulars of the charge sheet indicated that he had allegedly committed the offence on unknown dates. He questioned the manner in which the evidence of the complainant was received by the trial court. He explained that the *voire dire* examination had established that the complainant was intelligent. It was therefore his submission that the complainant should have been specific on the dates she alleges to have been sexually assaulted. The Appellant denied that he committed the offence. It was his case that the evidence adduced by the prosecution witnesses did not establish the charge brought against him to the required standard of proof beyond any reasonable doubt. In particular, he faulted the trial magistrate for reaching the verdict that he was guilty as charged. He urged the court to allow the appeal.

Ms. Akunja for the State opposed the appeal. She submitted that the five witnesses called by the prosecution established to the required standard of proof that indeed the Appellant defiled the complainant. The prosecution witnesses adduced evidence which pointed to the Appellant as the perpetrator of the sexual assault. The complainant's testimony was corroborated by medical evidence which established that indeed the complainant had been defiled. On the claim that the charge sheet was defective, Learned State Counsel conceded that the Appellant was charged under the wrong penal section of the **Sexual Offences Act**. However, she was of the view that that defect in the charge sheet was not fatal to the case because the same was curable under **Section 382** of the **Criminal Procedure Code**. She urged the court to reach the same verdict as the trial court and find that the prosecution had established that indeed it was the Appellant who sexually assaulted the complainant. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**.

This court will address the first issue that the Appellant raised in his petition of appeal. He complained that he was convicted on the basis of a defective charge sheet. The defect in the charge sheet, according to the Appellant negated his conviction by the trial court. He submitted that he was charged under **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. He had no problem with **Section 8(1)** of the **Act** which defines the offence. He takes issue with the fact that he was charged under the penal **Section 8(4)** which sets out the sentence that ought to be imposed where the victim of the sexual assault is aged between 16 and 18 years. From the evidence adduced by the prosecution witnesses, it was evident that the complainant was said to be aged 8 years at the time of the sexual assault. The prosecution conceded that indeed there was a defect in the charge sheet. The Appellant should have been charged under the penal **Section 8(2)** of the **Sexual Offences Act**. This defect did not however prejudice the Appellant. It was amenable to rectification under **Section 382** of the **Criminal Procedure Code**.

Upon re-evaluation of the arguments made in this regard, the test upon which this court will apply in order to determine if the charge sheet is defective was set out by the Court of Appeal in **Obedi Kilonzo Kevevo v Republic [2015] eKLR** where the Court held that:

“The test applicable for an appellate court when determining firstly the existence of a defective charge, and secondly its effect on the Appellants’ conviction is whether the conviction based on the alleged defective charge occasion miscarriage of justice resulting in great prejudice to the Appellant. In the case of JMA v Republic (2009) KLR 671, it was held inter alia that:

“It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the Appellant is not discernable.”

In **PNB v Republic [2017] eKLR** the court held that even where a defect is detected in a charge by the Appellate court, it is not all defects that may result in invalidation of the charge. The test that the court should apply is whether the charge sheet contains sufficient information which contains a specific statement of offence which gives the Appellant necessary information for the Appellant to mount a defence or challenge to the charge brought against him.

In the present appeal, it was clear to this court that the defect noted by the Appellant was not fatal to the prosecution’s case. The charge contained information which set out the offence that the Appellant was charged. It contained particulars of the charge that the Appellant was being called upon to answer to. The defect in the penal section of the charge sheet did not prejudice the Appellant. The same is curable under **Section 382** of the **Criminal Procedure Code** which grants this court discretion not to reverse or alter a decision a trial court where it is established that the error or omission or irregularity did not occasion a failure of justice. It was clear to this court that the Appellant knew the charge that he was facing. He ably defended himself during the entire trial. The particulars set out in the charge clearly enabled him to defend himself. This court finds this ground of appeal to be without merit.

To establish the charge of defilement, the prosecution was required to prove the three essential ingredients, namely that the victim of the sexual assault was penetrated, the age of the victim and finally the identity of the perpetrator. In the present appeal, the complainant testified that the Appellant sexually assaulted her on several occasions when she went to her friend’s house after school. The Appellant lived in the same neighbourhood as the family of the complainant. She testified that on the several occasions that she was sexually assaulted, her friend was locked in the bedroom while the Appellant sexually assaulted her in the sitting room. After each act, the Appellant threatened the Appellant not to tell anyone lest she faced dire consequence. The complainant, due to fear, did not tell her mother PW2 NWM. PW3, Mercy Inoti, the complainant’s teacher noticed that the complainant was walking with difficulty. When she questioned her, she was able to establish that the complainant had been sexually assaulted. She told PW3 that she had been sexually assaulted by the Appellant whom she referred to by the name Hassan. PW3 informed PW2. The complainant was taken to hospital where it was established that she had indeed been sexually assaulted. Her hymen was missing. It was not fresh. The P3 form was produced by PW5 Dr. Joseph Maundu. This court therefore holds that the prosecution indeed established to the required standard of proof beyond any reasonable doubt that the complainant was penetrated.

The second ingredient that the prosecution was supposed to establish is the age of the complainant. The complainant herself testified that she was eight (8) years old at the time of the incident. She was a class four pupil when she testified before court. Her mother PW2 confirmed her age. Although no documentary evidence was produced in court to establish the age of the complainant, this court formed the view that the evidence by the prosecution witnesses indeed established to the required standard of proof beyond any reasonable doubt the age of the complainant to be 8 years.

The third ingredient is the identity of the perpetrator. From the evidence adduced by the complainant, it was clear that she had interacted with the Appellant for a long time. The Appellant was an uncle to her friend by the name S. The Appellant used to pick the said S from school each evening. In many occasions, she picked S with the complainant. This was confirmed by the teacher who testified in court. Due to the fact that they lived in the same neighbourhood, the complainant stayed with the said S until she was picked by her mother. She testified that it was during this time she was sexually assaulted. She was well known to the Appellant. She referred to him by his name Hassan. This court could discern no reason why the complainant could point at the Appellant as the perpetrator if indeed he did not sexually assault her. The complainant’s testimony in regard to the identity of the perpetrator was corroborated by PW3 who testified that it was the Appellant who used to pick S and the complainant from the school. Upon re-evaluation of this evidence, including the defence offered by the Appellant (which essentially narrated the circumstances of his arrest), this court holds that the prosecution did establish to the required standard of proof beyond any reasonable doubt that the Appellant was the perpetrator of the sexual assault.

In the premises therefore, this court finds not merit with the Appellant's appeal in both on conviction and sentence. The appeal is dismissed. The conviction and sentence is upheld. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2019

L. KIMARU

JUDGE