



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 72 OF 2016

GKSAPPELLANT

VERSUS

REPUBLICRESPONDENT

(from the original conviction and sentence by F.Nyakundi , R.M, in Mumias SPMC S.O. No. 1 of 2016 delivered on 3/8/2016).

J U D G M E N T

1. The appellant was convicted of the offence of defilement contrary to section (8) (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 25 years in prison. He was aggrieved by the conviction and the sentence and filed this appeal through the firm of Wesutsa & Co. Advocates. The grounds of appeal are:

1. That the learned trial magistrate erred in law and fact by convicting the appellant upon speculation, conjecture and hearsay as opposed to facts on record.
2. That the learned trial magistrate erred in law and fact by ignoring material inconsistencies of the state witnesses testimonies.
3. That the learned trial magistrate erred in law and fact by failing to take into account that no valid documentary evidence was adduced as evidence with regard to the age of the complainant.
4. That the learned trial magistrate erred in law and fact by failing to make a finding that the evidence on record tendered towards the acquittal of the appellant.

The appeal was opposed by the state.

Case for prosecution

2. The charge against the appellant was that on the 8th November, 2015 at [particulars withheld]market in Mumias sub – county within Kakamega County, he intentionally caused his penis to penetrate the vagina of F.M (herein referred to as the complainant) a child aged, 14 years.

3. The case for the prosecution was that the complainant was a primary school going child. She was living with her mother HM PW2. That on the morning of 8/11/2015 the complainant was on her way to school when she met with the appellant who was a person known to her. The appellant lured her into his house where he defiled her. After he was through she went to school. She did not report to her mother. Later her mother learnt that the girl was having an affair with the appellant. She reported at Mumias police station.

The appellant was arrested in January 2016. CPL Kanario PW4 investigated the case. The complainant told her that the appellant had defiled her on the 8/11/15 without the use of a condom. She took the complainant and the appellant to Matungu Sub –County Hospital where they were examined. Both of them were found to be HIV positive. A clinical officer at Matungu Sub-County Hospital Pw3 completed the complainant’s P3 form. The age of the complainant was assessed at the hospital and estimated at 13/14 years. The appellant was charged with the offence. He denied the charge. During the hearing the clinical officer PW3 produced the complainant’s treatment notes and the P3 form as exhibits, Ex 1 and 2 respectively. She also produced the appellant’s treatment booklet as exhibit, Ex 3.

Defence case.

4. When placed to his defence , the appellant gave a sworn statement and stated that he is a sugar cane cutter at Mumias. That he does not know the complainant and that he met her at the police station. That he had a problem with a person called Faradi whom he had lent money. The person refused to pay back his money. He was then arrested. He and the complainant were taken to Matungu Hospital. He was examined. He denied that he defiled the complainant.

Submissions

5. The advocates for the appellant submitted that the P3 form for the complainant that was completed by the clinical officer does not indicate that an HIV test was carried out on the complainant nor the type of HIV test done. That there were no such medical reports as regards the appellant. That such information was important as it would confirm if both the appellant and the complainant had the same type of HIV strain for it to be conclusively held that the appellant defiled the complainant. That the complainant alleged that she was a virgin as of the material day and therefore that it must have been the appellant who transmitted the HIV virus to her. That the complainant at the same time stated that she did not bleed nor felt pain on defilement. That it is expected that a girl who is a virgin would experience some sort of physical pain and or injury upon engaging in a sexual intercourse with a male adult person.

6. The advocates submitted that there were irreconcilable contradictions between the testimonies of the complainant on the one hand and PW2 and PW3 on the other hand . That the complainant stated that she informed her mother PW2 of the incident after 2 days. However PW2 said that she learnt of the allegations on the 8th December, 2015 from one Farida. That Pw2 and PW3 stated that the complainant was severally defiled by the appellant. PW3 said that the latest incident was on 25th December, 2015 and that the appellant had eloped with the complainant. However that the complainant in her testimony stated that she only had sexual intercourse with the appellant on the 8th November, 2015. She never stated that she eloped with him.

7. The advocates submitted that the evidence on record was insufficient to sustain a conviction. They urged the court to accord the appellant the benefit of doubt.

8. The state did not make any submissions. They relied on the record and the judgment of the lower court.

Determination

9. This is a first appeal. It is the duty of a first appellate court to analyse and re-evaluate the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – see **Okeno Vs Republic 1972 E.A 32**.

10. Ground 3 of the petition of appeal is that the trial court erred by failing to take into account that no documentary evidence was adduced as evidence with regard to the age of the complainant. The trial court found that the complainant was aged between 13 and 14 years.

11. The importance of proving the age of a victim of defilement was emphasized by the Court of Appeal in **Alfayo Gombe Okello Vs Republic, Kisumu Criminal Appeal No. 203 of 2009** where it was held that:

“ ... in its wisdom parliament chose to categorize the gravity of the offence on the basis of the age of the victim , and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)”

12. The age of a person can be proved by documentary, oral or by medical evidence. In the case of **Mwolongo Chichoro Mwanjembe Vs Republic, Mombasa Criminal Appeal No. 24 of 2015**, cited in **Edwin Nyambogo Onsongo Vs Republic (2016) eKLR** where the Court of Appeal held 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 documents, 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.”” we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

13. The complainant herein stated that she was aged 15 years having been born in the year 2000. Her mother PW2 stated that the girl was aged 13 years. A dental examination of the girl’s teeth was done by Dr. Wagwe at Matungu Sub – County Hospital and her age was estimated at between 13 and 14 years . The age assessment report corroborated the evidence of the complainant’s mother that the girl was aged 13 years. Consequently I find that the trial court did not err in holding that the girl was of 13-14 years of age.

14. The appellant’s advocate submitted that there was no medical evidence to support that the complainant and the appellant had the same strain of Hiv virus. That it cannot be conclusively held that the appellant defiled the complainant.

15. The position of the law is that though medical evidence can be used to support evidence of defilement or rape, the offences of rape and defilement are proved by way of evidence including oral evidence. In **AML Vs Republic (2012) eKLR** ,the Court of Appeal held that ,

“ The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

16. The said court upheld the same in **Kassim Ali Vs Republic**, Mombasa Criminal Appeal No. 84 of 2005 where it stated that:

“ (The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence.”

17. The fact that there was no medical evidence as to whether the complainant and the appellant had the same strain of HIV was not fatal to the case. The court could still convict on the oral evidence of the witnesses or from circumstantial evidence.

18. The other issue raised by the appellant was of contradictions in the prosecution evidence. The complainant stated that she informed her mother of the incident after 2 days. Her mother on the other hand stated that she was informed by a neighbour called Farida on the 6/12/2015 that her daughter had been visiting the appellant’s house. This makes it close to a month from the date that the complainant says that the appellant defiled her. The complainant’s mother did not indicate in her evidence that her daughter informed her of the incident of 8/11/2015. The complainant in her evidence never stated that she had eloped with the appellant. The investigating officer PW4 stated that the appellant had been defiling the appellant since November 2015 and that the latest incidents were on 25/12/2015 and 30/12/2015. The clinical officer PW3 recorded in the p3 form that the complainant told her that the appellant had been defiling her since November, 2015 and that the latest incident was on 25/12/2015. The complainant in her evidence never mentioned any incidents of either 25/12/15 or 30/12/2015.

19. The complainant was the only witness that the appellant defiled her. The question then is whether she

was a credible witness. The complainant stated that she was a virgin when she was defiled by the appellant. However she was examined in hospital some months later after the incident. Medical evidence could therefore not support that. Further to this the complainant did not inform her mother of the incident of 8/11/15. Her mother learnt of some incidents of her affair with the appellant from Farida about a month later from the incident of 8/11/15. Why then was complainant lying that she informed her mother of the incident of 8/11/15 after 2 days?

20. Besides that the complainant stated that the incident of 8/11/15 happened at 6 a.m when she was on her way to school. The investigating officer PW4 on the other hand stated that the complainant had been sent to buy fish at the market when the incident of 8/11/15 happened. Why would the complainant have given two different versions of where she was going on 8/11/2015 when she was defiled by the appellant?

21. The complainant's mother said that her daughter had eloped from home. However the complainant did not mention that she had eloped from home leave alone that she had eloped with the appellant. She did not mention any incident of 25/12/15 as alleged by the clinical officer and the investigating officer. In fact she stated in her evidence that before they reported to the police in January 2016 she had not met the appellant from the date of defilement on 8/11/15. If the complainant had eloped from home with a man, who is it that she had eloped with? If she had not met with the appellant from 8/11/15, why did she tell the clinical officer and the investigating officer that the appellant had also defiled her on 25th and 30th December,2015?

22. It appears to me that the complainant was not a credible witness. She appears not to have been candid to the court on the matter. The defilement of 8/11/2015 was not reported to the police until nearly two months later. The trial court ought to have treated the evidence of the complainant with a lot of caution. In the case of **Kimani Ndungu Vs Republic (1979) 1 KLR 282**, the Court of Appeal pointed out on how to treat the evidence of such a witness when it stated that :

“ The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise suspicion about his trustworthiness or do or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence ”

23. The trial court did not consider the indiscrepancies in the evidence for the prosecution. The woman called Farida who was said to have seen the complainant visiting the appellant's house did not testify in the case. The court relied on the unsupported evidence of the investigating officer that the appellant defiled the complainant without use of a condom. The court also relied on unsupported evidence that the appellant had eloped with the complainant. It also relied on unsupported evidence that the appellant is the one who infected the complainant with HIV virus.

24. The inconsistencies in the evidence for the prosecution witnesses left doubt in the case that the appellant defiled the complainant. There was a claim by the complainant's mother that the appellant assaulted her. The complainant's story was that the appellant had reported to the police that the mother had damaged his house. Her mother however said that the report was that she had stolen his money and property. Could then the matter have been fabricated because the appellant had some differences with the complainant's mother? The trial court did not consider this aspect of the case. The fact that both the appellant and the complainant were HIV positive did not by itself prove that the appellant is the one who infected the complainant with HIV virus.

25. Taking all the above into consideration, I am not satisfied that the conviction of the appellant was safe. The conviction is thereby quashed and the sentence set aside. The appellant is set at liberty forthwith unless lawfully held.

Delivered, dated and signed in open court at Kakamega this 20th day of February, 2019.

J. NJAGI

JUDGE

In the presence of:

N/A.....for the appellant

Mr. Ngetich.....for state

Appellantpresent

Court AssistantGeorge

14 days Right of Appeal.