



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 32 OF 2016

BENSON MUTHOKA MUASYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the decision of Hon. V. J. Yator, Resident Magistrate delivered on 17th March, 2016 in Mombasa Chief Magistrate's Court Criminal Case No. 12 of 2015)

JUDGMENT

1. The appellant was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 25th day of December, 2014 at [Particulars Withheld] area in Changamwe within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of CLA [name withheld] a girl aged 10 years old (sic).
2. The appellant faced an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 25th December, 2014 at [Particulars Withheld] area in Changamwe within Mombasa County, intentionally and unlawfully caused his penis to rub the vagina of CLA [name withheld] a girl aged 10 years old (sic).
3. The case was heard to its logical conclusion and the Hon. Magistrate found the appellant guilty of the main charge of defilement. The appellant was sentenced to serve 20 years imprisonment.
4. The appellant being dissatisfied with the said decision filed a petition of appeal. He raised 4 grounds of appeal. On 27th November, 2018, he amended his grounds of appeal to read as follows:-
 - (i) That the Learned Trial Magistrate erred in law and fact by convicting and sentencing the appellant without subjecting the medical treatment notes labeled Ex2 to any assessment whatsoever for had it done so, it would have confirmed that no defilement took place against the complainant;
 - (ii) That the Learned Trial Magistrate erred in law and fact in that the medical evidence relied on by the prosecution lacked corroboration which is required in all sexual cases. That the court failed to look for corroboration from the evidence that was led and recorded, therefore the benefit of doubt ought to be given to the appellant;
 - (iii) That the Learned Trial Magistrate erred in law and fact by sustaining a conviction in spite of glaring inconsistencies on the part of the prosecution's witnesses testimony before court and on documents produced to support their testimony contrary to Section 163 (c) of the Evidence Act;
 - (iv) That the Learned Trial Magistrate erred in law and fact by shifting the burden of proof from the prosecution to the appellant without appreciating that proof of any particular fact lies on the person who wishes the court to believe in its existence contrary to the provisions of Section 109 of the Evidence Act; and
 - (v) That the Learned Trial Magistrate erred in law and fact in failing to consider the appellant's defence which remained water tight and unshaken by the prosecution.
5. The appellant relied on his written submissions which were to the effect that under the Sexual Offences Act, conviction and sentence is firmly hinged on the age of a victim amongst other things. He submitted that in this case a photocopy of the victim's birth certificate was produced as P.exh. 1, to prove the age of the victim. This court was referred to page 11 lines 10-12 of the lower court proceedings, where the

victim's mother told the court that the original birth certificate of the victim was at home and what she had in court was a copy of the same. The appellant submitted that the prosecution in so doing failed to comply with the provisions of Section 67 of the Evidence Act which provides that documents must be proved by primary evidence.

6. He also referred to Section 68 of the Evidence Act on circumstances under which secondary evidence may be adduced. He thus stated that the prosecution failed to prove the age of the victim to the required standard as per the provisions of Section 107(1) and (2) of the Evidence Act. The appellant therefore submitted that in the absence of the original birth certificate, the evidence of PW2 was not sufficient to support the age of the victim.

7. The appellant referred to the medical notes presented before the lower court and contended that they did not prove the offence of defilement. This was for the reason that they showed that there was no penetration of the victim's vagina because the hymen was noted, the external genitalia was normal with no trauma and lacerations noted, but the P3 and PRC forms showed that the victim was defiled. He prayed for the said contradiction to be resolved in his favour. He further said that the absence of a hymen in a female minor does not necessarily mean that the victim was defiled.

8. The appellant also challenged the production of the P3 form that had been filled by Dr. Ngone, by another Doctor, PW4. The appellant was of the view that a proper foundation was not laid before PW4 was allowed to testify on behalf of Dr. Ngone.

9. The appellant also submitted that his defence was rejected for no apparent reason, whereas he was incriminated by his Landlord. He prayed for the appeal to be allowed.

10. The respondent's submissions were filed on 30th November, 2018. Ms. Marindah, Prosecution Counsel, submitted that the age of the complainant was proved beyond reasonable doubt through her birth certificate which indicated that she was born on 21st April, 2004 and was therefore 10 years old at the time of the incident. It was argued that no issue was raised before the trial court by the appellant on the authenticity of the birth certificate. It was submitted that the mother of the child, PW2, corroborated the age of the child when she testified that she gave birth to PW1 on 22nd April, 2004.

11. On the issue of penetration, Ms Marindah submitted that both the P3 and the PRC forms indicated that there were injuries on the genitalia of the victim as her hymen was broken and she had lacerations on her vaginal opening. The Prosecution Counsel further stated that PW4 testified that the victim had the said injuries. She indicated that PW1 was found locked in the appellant's house and she was saying "niache utaniumiza" (stop, you will hurt me). In Ms. Marindah's view, the injuries PW1 sustained were consistent with her testimony that the appellant defiled her.

12. She submitted that the production of the P3 form by PW4, Doctor Mufick Shadni instead of Dr. Ngone was procedural as the former had worked with the latter for 4 years before he was interdicted. Further, the Prosecution Counsel stated that the P3 form was produced in line with the provisions of Section 33 of the Evidence Act.

13. Ms. Marindah counteracted the appellant's contention that the charge was a frame-up by PW3. She submitted that PW3 was attracted to the appellant's house by the cries of PW1. She also submitted that PW1 was not known to the appellant or PW3 thus there was no reason for framing-up the appellant.

ANALYSIS AND DETERMINATION

14. The duty of the first appellate court is to review the evidence tendered before the court below and come up with its own conclusion bearing in mind that it neither saw nor heard the witnesses testify. In the case of **David Njuguna Wairimu vs. Republic [2010] eKLR** the Court of Appeal reiterated this duty as follows:-

"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

Evidence tendered before the lower court

15. The evidence adduced before the lower court by the complainant, CLA also referred to as CL [names withheld] who testified as PW1 was that she was 10 years of age and in Class 4. On 25th December, 2014 when coming from church at around 12:00 p.m., she met a person whom she did not know. He asked her to accompany him to his house where he would give her Kshs. 500/=. He held her hand and took her to his house in Mlolongo. She recounted that on entering the house the appellant locked it and removed her pants. He removed his "dudu" and put her on the bed and started doing bad things to her. She stated in Kiswahili "alingiza dudu yake hapa" (he put his penis here) as she pointed at her vagina. She testified that she felt pain and started screaming. A male neighbour pushed the door and entered the house. He arrested the appellant and they went to Changamwe Police Station. On the same day, she was taken to Coast Province General Hospital (CPGH) but it was closed. She was taken to Bomu where she was told to go back to CPGH. She was given medicine at the Hospital.

16. PW1's mother, SA [name withheld] testified as PW2. She received a report on 25th December, 2014 at about 1:30 p.m., from one Said who informed her that PW1 had been defiled and she was at the Police Station. PW2 called PW1's father and they went to Changamwe Police Station. They were told to take PW1 to Hospital.

17. It was PW2's evidence that her husband took PW1 to CPGH but they were told that the gender office was closed. They took her to

Mkomani Hospital where she was tested. On 27th December, 2014 they took her to CPGH where she was tested and given medicine.

18. It was PW2's evidence that PW1 told her that the appellant had told her he would give her money. The appellant then got hold of her hand and they went to his house where the appellant defiled her. PW2 identified a photocopy of PW1's birth certificate which indicated that she was born on 21st April, 2004. She informed the court that the original was at home. On her part, she stated that PW1 was born on 22nd April, 2004 and was 10 years old. She indicated that she did not know the appellant before.

19. PW3 was Jared Fikiri Mwatabo, a Community Policing Officer at Chaani area. He testified that on 25th December, 2014 at around 11:00 a.m., he was at his house. He then heard a child's voice from one of the houses that was behind his. He knew the said house did not have a woman or child. He heard the child saying "niache unanimumiza". PW3 went outside and found his son who told him that he saw a child entering the house. He went to the house and pushed the door. He saw the appellant and the child in a corner of the house. He arrested the appellant and took him to the Chief's Office. He then called for a police vehicle. He indicated that the appellant used to stay in one of three houses with one of the tenants.

20. PW4 was Dr. Mutick Shadni based at CPGH. She had with her a P3 form filled by Dr. Ngone which indicated that the victim's hymen was broken and there were lacerations on the vaginal opening. PW4 produced treatment notes for the victim. She also produced PW1's birth certificate, the P3 and PRC forms and laboratory results.

21. The Investigating Officer, No. 96053 PC Jacklyne Onoki, attached to Changamwe Police Station testified as PW5. She recalled that on 25th December, 2014 at around 4:00p.m., she perused the OB and found a defilement case assigned to her to investigate. She testified that PW1's father called her the following day and told her that they had taken the child to Hospital but the Doctors were not there. She accompanied them to CPGH the following day but found no one at the gender desk. They were advised to take the child to the emergency section where the child was given medicine to prevent HIV and pregnancy. They were advised to take the child to the gender desk on 29th December, 2014. She collected the results from CPGH which confirmed that PW1 had been defiled.

22. PW5 testified that she established the age of the child as 10 years from the original birth certificate and clinic card. She recounted the narrative PW1 told her about how she was enticed with Kshs. 500/= by the appellant and defiled.

23. In his defence that appellant stated that on 22nd December, 2014, the house he was staying in had been locked up by the Landlord who was asking for the appellant's housemate by the name Jasphet. The appellant claimed that he was framed up by the Landlord for this offence.

24. The issues for determination are:-

- (i) If the age of the victim was established; and
- (ii) If the offence of defilement was proved beyond reasonable doubt.

Age of the victim

25. Inasmuch as the appellant stated that the age of PW1 was not resolved, there is no doubt that the mother of a child knows when she gave birth to her child. In this case, PW2 testified that her child was born on 22nd April, 2004 and she was 10 years old when the offence was committed. Although the birth certificate showed that PW1 was born on 21st April, 2004, she was within the age group of victims that fall under the provisions of Section 8(3) of the Sexual Offences Act. At the time PW2 testified, the appellant did not cross-examine her as to the validity or otherwise of the birth certificate. PW5, the Investigating Officer testified that she had seen the original birth certificate and Health Card of PW1 which established her age as 10 years.

26. In the Ugandan Court of Appeal case of **Francis Omuroni vs Uganda**, Criminal Appeal No. 2 of 2000 it was held that:-

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense"

If the offence of defilement was proved beyond reasonable doubt

27. On the issue of penetration, the PRC form that was filled on 29th December, 2014 after PW1 was examined indicates that she had lacerations on her vaginal orifice and her hymen was broken. The P3 form indicates that the hymen was not intact and there were lacerations on the vaginal orifice.

28. The diagnosis and treatment notes of PW1 at CPGH of 25th December, 2014 indicate that PW1's external genitalia was normal and there were no lacerations. The hymen was noted. In the booklet containing the treatment notes, the history preceding the observations made before treatment are recorded therein. They state that PW1 complained of having been forced into a sexual act by a known person though *"she declines penetration as she screamed before the act begun"*. The dilemma brought about by the contents of the treatment notes on the one hand and the PRC and P3 forms on the other, is if PW1 was defiled or not. Faced with contradictory medical observations, the prosecution should have dug deeper to try and reconcile the medical findings. If need be, in such a case, the Prosecutor should have called the Medical Personnel who examined PW1 on 25th December, 2014 at CPGH, to give evidence and be subjected to cross-examination. That was not done.

29. When PW3 went to the appellant's house, he found him wearing a vest and underwear. PW1 did not explain if the appellant removed all

his clothes at the time he defiled her or if he was left partly naked. PW1 said that the appellant put her on a bed and inserted his penis into her vagina. The evidence of PW3 was that he found PW1 and the appellant at the corner of the house.

30. In the circumstances of the contradictory medical evidence that was adduced, I find that the Hon. Magistrate misdirected herself by convicting the appellant for the offence of defilement. I hereby set aside the said conviction.

31. I however find that the appellant committed the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. I hereby convict him for the said offence. I set aside the sentence of 20 years imprisonment and substitute thereof with a sentence of 10 years imprisonment for the offence of indecent act with a child. The said sentence shall run from the 17th of March, 2016, when the appellant was sentenced by the lower court. The appeal succeeds only to the above extent.

DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of February, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Ogweno, Prosecution Counsel for the DPP

Mr. Oliver Musundi – Court Assistant