



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.07 OF 2018

ISIAIAH SAITU KAMWELO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence imposed by D.K. Matutu (SPM) in the Principal Magistrate's Court at Kilgoris in Criminal Case No. 1415 of 2006)

JUDGMENT

1. The appellant, **ISIAIAH SAITEU KAMWELO**, was charged with the offence of defilement contrary to **section 8(1) (3) of the Sexual Offences Act**. The particulars of the offence were that on diverse dates between 26th and 29th September, 2014 at [particulars withheld] Village in Transmara West District within Narok County, he intentionally caused his penis to penetrate the vagina of M.S. a girl aged 13 years. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act**.

2. The trial court found the appellant guilty of the main count. Being aggrieved with that decision, the appellant has preferred this appeal against his conviction and sentence on the following grounds:

a. The learned magistrate misdirected himself in fact and law by not appreciating that the prosecution had not proved the case of defilement beyond reasonable doubt against the appellant in the face of the conflicting testimonies that could not have allowed the said conviction and sentence;

b. The trial magistrate erred in law and in fact in failure to ascertain the actual age of PW 1 the complainant;

c. The learned magistrate erred in fact and law by shifting the burden of proof to the accused in failing to consider the fact that the prosecution had not called key witnesses whose evidence would have been detrimental to the prosecution case;

d. The learned magistrate misdirected himself in fact and law in relying on opinion evidence of PW 4 which on the face of it was riddled with inconsistencies and could not be substantiated and connect the appellant to the said offence; and

e. That the conviction was against the weight of evidence of the prosecution.

3. The appellant filed grounds of appeal and written submissions. He contends that the complainant was not a reliable witness as she had changed her testimony after being stood down without explanation. That the medical evidence of PW 4 did not connect the appellant with the offence of defilement and that the age of the complainant was not sufficiently ascertained. The appellant further contends that the conviction was against the weight of evidence as there were glaring inconsistencies in the prosecution's evidence.

4. In response, counsel for the state submitted that the appellant had been correctly convicted of defilement of the minor and that the complainant had identified the appellant whom she knew by name. He submitted that the complainant had stayed with the appellant for days during which time they had sex at least once. Counsel further submitted that the medical evidence of PW 4 had corroborated the claim that the minor had been defiled.

5. The duty of the first appellate Court is to consider the evidence, evaluate it and come to an independent finding having regard to the fact that it neither heard nor saw the witnesses testify(**see Okeno v Republic [1972] E.A. 32**)

6. I will proceed to evaluate the evidence as it emerged before the trial court. After *voir dire* examination the complainant, who testified as PW 1, testified that she met the appellant in April 2014 on her way to Kilgoris. The appellant started wooing her and gave her his cellphone number with which she called him on 28th August 2014. She collected some items from home and travelled with the appellant to his home where she had sexual intercourse with the appellant. On 26th October 2014, the appellant called her and requested her to go with him to his

home which she did. She testified that on this day, she slept with the appellant but had no sexual relations with him. She similarly spent the following day with him without incident and that the next day, she met her uncle who took her to Kilgoris Police Station.

7. The complainant's brother S.K. (PW 2) told the court that on 26th September 2014, the complainant went to school and returned home at about 5 p.m. When he got back home in the evening, he could not trace the complainant. He asked about her whereabouts from his neighbours and grandmother without luck. He looked for the complainant for two days and on Monday he received information that she was at Ole Sentu. He reported the matter to the police together with PW 3 who later met the complainant and took her to the police station. PW 2 testified that when they asked her, the complainant told them that she had been taken away by the appellant. They looked for the appellant, arrested him and took him to Kilgoris Police Station.

8. PW3 testified that he received information that his niece, the complainant had been missing. A few days later he met her at Ole Sentu on his way home. She informed him that she had been with the appellant for 3 days. He took the complainant to the police station and also arrested the appellant with the help of his neighbours.

9. PW4 the clinical officer presented a P3 form filled by Dr. Ogolla whom he had worked with for a year and was familiar with her handwriting. He testified that on 30th September 2014 the complainant had been brought in for examination. She was found not to be pregnant and but had an infection. An examination of her genitalia revealed that she had no injuries. Her hymen was not freshly broken and she had no stray hair, blood or discharge. A diagnosis of defilement was made.

10. PC David Ndung'u (PW 5) testified that he was tasked with investigating the matter. He took the complainant and the accused to hospital for examination and charged the appellant with the offence of defilement. On a different date, the investigating officer told the court that an age assessment report had been prepared but the same went missing and the complainant could not be traced for re-assessment. He asked the court to rely on the P3 form and treatment notes which indicated that the complainant was 13 years old.

11. When put on his defence, the appellant told the court that he woke up one morning and found people at his door asking him to produce the complainant. They searched his house, assaulted him and took him to the police station. He testified that the complainant was found a day before she had been arrested and that they were both taken to the hospital. He stated that the charges against him had been fabricated as the complainant's family had a grudge with him.

12. The appellant was charged and convicted on the offence of defilement contrary to **Sections 8 (1) and (3)** of the Sexual Offences Act which provides;

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement;

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

13. The prosecution's task was to prove that there was penetration of the child by the appellant and that the complainant was aged between 12 and 15 years.

14. Having evidence and considered the parties' submissions, the main issues that arise for determination in this matter are:

a. Whether the complainant's testimony was sufficient to prove the offence; and

b. Whether the prosecution had proved its case on a balance of probabilities.

15. In making a finding that the appellant was guilty, the trial court relied on the evidence of the complainant which was corroborated by the evidence of the medical doctor. The court found:

"Only one witness can testify as to the fact of sexual intercourse since the accused and the alleged victim were not found in pari delicto (in the act). Was the alleged victim telling the truth? I did not have the opportunity of hearing the alleged victim testify. However her testimony is clearly captured in extremely legible proceedings recorded by my predecessor Hon. Munyendo (RM) who has since ceased to exercise jurisdiction by reason of transfer. In the proceedings, the alleged victim says she was defiled. I believe the alleged victim when she says she was defiled. Her testimony finds corroboration in the medical evidence adduced."

16. The appellant challenges the decision of the trial court for its over reliance on the complainant's evidence. In her testimony, it is evident that the complainant and the appellant had a cordial relationship and she was reluctant to implicate him for the offence. Initially, the complainant testified that she had had sexual relations with the appellant on 28th August 2014. The prosecution counsel asked to have the complainant stood down but she varied her testimony and denied that she had had any sexual relations with the appellant on 26th October, 2014 or the subsequent days.

17. Although the prosecution did not declare her as such, the evidence given by the complainant shows that she was a hostile witness. A hostile witness was defined in **Abel Monari Nyanamba & 4 others v Republic [1996] eKLR** as one who "from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court."

18. The Court of Appeal in **Maghanda vs Republic [1986] KLR 255 at page 257** held:

“Halima was called to testify for the prosecution. She was declared a hostile witness. The magistrate said that therefore her evidence could be safely disregarded for, being the appellant’s girlfriend, it was but natural that she would testify as a defence witness. The first part of the magistrate’s statement strictly was misdirection. The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the court.”

19. Further in **Daniel Odhiambo Koyo -vs- Republic [2011]eKLR** the Court of Appeal stated that the probative value of such evidence is negligible and may only be relied upon in clear cases to support the prosecution of the defence case.

20. The proviso to section 124 of the Evidence Act allows the court to convict on the basis of the evidence by the complainant alone if it is satisfied that she was telling the truth. In this case, the trial court stated that it was satisfied that the complainant was telling the truth and indicated that her evidence had been sufficiently corroborated by medical evidence.

21. In my view, the evidence of the complainant was unreliable for its inconsistency. The medical evidence tendered by PW 4 was equally insufficient to corroborate the evidence of the complainant whose probative value was inadequate in itself. The doctor did not observe any blood, discharge or injuries on the complainant’s genitalia. He indicated that the complainant had an infection but it was not shown whether she had been infected by the appellant and the medical report itself did not indicate that she suffered from an infection. The doctor observed that her hymen was not freshly broken thus there was no nexus created between the medical evidence tendered and the offence.

22. Having found that there was no direct or medical evidence linking the appellant to the commission of the crime, the case rests on whether there was sufficient circumstantial evidence to convict the appellant. The Court of Appeal in the case of **Kassim Ali v Republic [2006] eKLR** held:

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

23. The Court of Appeal in **Mohamed & 3 others versus Republic [2005] 1KLR 722** defined circumstantial evidence thus:-

“Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.”

24. PW 2 and PW 3 testified that the complainant had been missing for several days and that they were informed that she was with the appellant. When they arrested him, the appellant was not in the company of the complainant. No witnesses were called to testify as to whether the complainant had spent the time in question in the appellant’s company. This court therefore comes to the inevitable conclusion that the prosecution did not prove its case on beyond reasonable doubt.

25. Before concluding this matter, I will address the question of whether the prosecution proved the age of the complainant. I have noted the authorities cited by the appellant on this issue. In my view, it is important for the prosecution to prove the age of the complainant sufficiently. In **Alfayo Gombe Okello vs R Criminal Appeal No. 203 of 2009**, the Court of Appeal held:

In its wisdom Parliament chose to categorize the gravity of that 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.

26. In my view the P3 form and treatment notes provided enough to ascertain the age of the complainant. They indicated that she was aged 13 years. The complainant’s testimony that she was aged 12 years would not have prejudiced the appellant as the sentence for defilement of minors aged 12 and 13 years is equal.

27. In the end, this appeal is found to be merited and is allowed. The conviction and sentence is quashed and the appellant is set free unless otherwise lawfully held.

Dated, signed and delivered at Kisii on this 14th day of March 2019.

R.E.OUGO

JUDGE

In the presence of;

Appellant Present

Mr. Matoke for the Appellant

Mr. Otieno Senior Prosecution Counsel/ Respondent

Rael Court clerk