



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO 4 OF 2017

ANTONY AMIN KAJEMBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment and sentence delivered on 17th January, 2017 by Y. I. Khatambi, SRM in Malindi CM Sexual Offences Case No. 25 of 2014)

JUDGMENT

1. The Appellant, Anthony Amin Kajembe was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act, 2006 (SOA). The particulars of the offence being that on 14th April, 2014 in Malindi Sub-County within Kilifi County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of MKS a girl of aged 16 ½ years.
2. The Appellant was faced with an alternative charge of indecent act contrary to Section 11(a) of the Sexual Offences Act. The particulars of the offence being that on 14th April, 2014 in Malindi Sub-County within Kilifi county the Appellant intentionally and unlawfully committed an indecent act by touching with his hands the vagina of MKS a girl aged 16 ½ years.
3. The Appellant pleaded not guilty to the charges. At the conclusion of the trial he was convicted for the main count and sentenced to serve 15 years imprisonment.
4. Aggrieved by the decision, the Appellant through the amended grounds of appeal filed on 25th September, 2018 seeks to upset the conviction and sentence on the grounds that:-

“1. That, the learned trial magistrate erred in convicting me without seeing that the said penetration was not proved to the required standard of law.

2. That, the learned trial magistrate erred in law and fact in relying on the insufficient evidence of a single witness to convict me.

3. That, the learned trial magistrate erred in law and fact in convicting me without considering that the prosecution failed to prove its case beyond reasonable doubt contrary to section 109 of the Evidence Act.

4. That, the trial magistrate erred in total rejecting my defence while I owed no onus of proving my defence and innocence.”

5. The appeal was disposed of by way of written submissions. This is a first appeal and the duty of this court is to subject the evidence adduced at the trial to fresh analysis and come up with an independent decision. In doing so, the court is required to give allowance to the fact that, unlike the trial court, it did not have the opportunity of observing the demeanor of the witnesses as they testified.

6. The prosecution case as relayed to the trial court by its witnesses is that on 17th April, 2014 at about 10.00am PW1 EKS decided to go home from school. On reaching the gate he saw the Appellant who he identified as Baba Jay or Amin emerge from the bedroom he shared with his two sisters, one of them being the complainant. When he entered the room he found the complainant panting and crying. He did not talk to her and neither did she tell him what had happened. Later PW1 was asked by his father whether anybody had been to their house and he told him what he had seen. PW1 also stated that Mama Gift, a neighbour was at home when he found Amin in their house.

7. MKS testified as PW2 and told the court that she was born on 1st October, 1997. She identified her birth certificate in court. She told the court that on 14th April, 2014 at about 10.00am she had removed her clothes in preparation to bathe when the Appellant who was their neighbor entered the house and told her he wanted to have sex with her. She did not say anything. It was then that the Appellant pushed her

onto the sofa and forcefully entered her. After completing the act, the Appellant threatened to kill her if she revealed to anyone what had happened. She washed herself before reporting the incident to a neighbor called Mama Gift.

8. PW2 told the court that because of the threats she did not immediately report the incident to her father. She, however, made a report to her father a few days later. The matter was later reported to the police. She received treatment and a P3 form was filled for her at Malindi General Hospital.

9. SM., the father of the complainant, testified as PW3. He confirmed the testimony of PW2. He testified that he reported the incident to the police after receiving a report from PW2.

10. When cross-examined, PW3 told the court that when his daughter reported the incident to him, he, in the company of a neighbour called Charo, confronted the Appellant about the incident. The Appellant told them he had entered the room to do search. Thereafter the Appellant stormed out in protest. PW3 testified that Mama Gift confirmed to him that she had received a report of the incident from PW2.

11. PW4 Ibrahim Abdula, a clinical officer, examined the complainant on 30th April, 2014 and filled a P3 form for her. His evidence was that the complainant did not have any injuries but her hymen was broken. He produced a P3 form, treatment notes and the complainant's birth certificate as exhibits.

12. In his defence, the Appellant who testified as DW1 denied committing the offences with which he was charged,. He stated that on 14th April, 2014 when it is alleged he defiled the complainant he was away at work. His evidence was that trouble started when he questioned the non-payment of electricity and water bills for a period of one year. He found out that the father of the complainant was the one responsible for making the payments. When he asked him about the bills, he was told that he was a newcomer and from that day there was no peace between himself and the father of the complainant. The Appellant testified that he was only three months old at the place prior to the incident.

13. The Appellant further told the court that on 24th May, 2014 at around 11.00pm police officers in the company of the father of the complainant went and found him outside the house with his friend Francis. The police officers alleged they were smoking bhang and arrested them. At the police station his friend was released and he later learned that he was being charged for allegedly defiling the complainant.

14. In order to obtain a conviction in a case of defilement, the prosecution needs to establish penetration of a child by the accused person. Penetration, the age of the victim and the identity of the perpetrator are therefore key ingredients in a charge of defilement.

15. Through the submissions filed on 25th September, 2018, the Appellant citing a scientific research conducted between May 2011 and April 2012 submitted that the absence of the hymen is not of itself evidence of penetration. The Appellant asserted that the hymen may be broken accidentally by vaginal insertion of objects such as tampons and digits. It can also be tampered with by vigorous sporting activities, falling on sharp objects, riding of bicycles or surgical procedures.

16. The evidence adduced in respect of penetration is that of the victim of the assault. She narrated to the court that the Appellant entered her room without knocking the door and found her naked as she was preparing to bathe. He pushed her on the sofa, loosened the straps of his boxers, removed his penis and inserted it in her vagina. She felt pain in her vagina. When cross-examined by the Appellant she stated that there was blood in her vagina after the act. This is clear evidence of penetration.

17. The Appellant's claim that the complainant could have lost her virginity through any other means is not supported by the evidence adduced.

18. The evidence of the clinical officer supported the complainant's evidence that she had been penetrated hence the absence of the hymen.

19. The fact that the complainant was under 18 years and therefore a child was not disputed by the Appellant. The prosecution proved through the production of a birth certificate that the complainant was born on 1st October, 1997 and was about 17 years when the offence was committed on 14th April, 2014.

20. The identity of the Appellant was not in doubt. PW1, PW2 and PW3 all stated that the Appellant had been their neighbour for three months prior to the incident. They lived in the same building. PW1 identified him as Baba Jay or Amin. PW3 talked of Rasta or Baba Jerry. PW3 stated that the Appellant had three children and a wife. The evidence on identity of the Appellant was overwhelming. Indeed the Appellant accepted that he was a neighbor of the complainant's family.

21. The Appellant submitted that it was dangerous for the trial court to rely on the testimony of the complainant alone to convict him. He relied on the case of **Fuad Mohamed C. Dumila v Republic, Criminal Appeal No 210 of 2003** where it was stated that it was dangerous to convict on the evidence of a woman or girl alone in a case of an alleged sexual offence.

22. The Respondent answered the Appellant by stating that the proviso to Section 124 of the Evidence Act, Cap. 80 now allows for conviction in a criminal case involving a sexual offence where the only evidence is that of the alleged victim of the offence. The decision of the Court of Appeal in **Dennis Osoro Obiri v Republic [2014] eKLR** was cited as confirming this legal position.

23. The authority cited by the Appellant is no longer relevant in light of the proviso to Section 124 of the Evidence Act which excludes the requirement for corroboration in a criminal case involving a sexual offence where the only evidence is that of the alleged victim of the offence and the court, for reasons to be recorded in the proceedings, is satisfied that the alleged victim is telling the truth.

24. The Court of Appeal in **Dennis Osoro Obiri v Republic [2014] eKLR** explained the import of the proviso to Section 124 of the Evidence Act by stating that:

“20. The effect of the proviso to section 124 is to create, in cases of sexual offences, an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence of a child of tender years. In JACOB ODHIAMBO OMUMBO v REPUBLIC, Cr. App. No 80 of 2008 (Kisumu), this Court made the same point as follows:

“Though P’s evidence was that of a child of tender years, the court can convict on it by virtue of the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, as amended by Act No. 5 of 2003.”

Earlier in **MOHAMED VS REPUBLIC (2006) 2 KLR 138**, this Court asserted:

“It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”

23. We do not think there is any merit in the charge that the first appellate court erred by refusing to follow binding judgements from this Court. The judgements in **NYANAMBA VS REPUBLIC** (supra) and **JOHNSON MUIRURI VS REPUBLIC** (supra), heavily relied upon by the Appellant, pre-date the proviso to section 124 of the Evidence Act which we have set out above. That proviso was introduced by the *Criminal Law (Amendment) Act 2003 (Act No. 5 of 2003)*. It was further amended into its present wording by the *Sexual Offences Act, No 3 of 2006*. The effect of the proviso, as we have already noted, is to enable the court to convict, in cases of sexual offences, on the evidence of the victim alone, if for reasons to be recorded, it believes that the victim is telling the truth. It is also important to bear in mind that prior to the above amendments, this Court in **MUKUNGU VS REPUBLIC (2002) EA 482**, had expressed the opinion that the requirement for corroboration in sexual offences affecting adult women and girls was unconstitutional to the extent that the requirement was against them qua women or girls. We accordingly find this ground of appeal lacking in merit.”

25. The trial court found the complainant to be a truthful witness and correctly proceeded to find the Appellant guilty on the strength of her evidence. I have perused the evidence of PW2 and find it to be consistent and in agreement with that of the other prosecution witnesses. There is nothing on record to make me find that she was not a truthful person. I therefore agree with the trial court’s finding that the Appellant attacked and defiled the complainant as per her testimony.

26. The Appellant urged this court to find that the complainant wasn’t a truthful person on the ground that she told Mama Gift about the incident but did not tell her father. The complainant explained that because of the threats made to her by the Appellant she feared telling her father about the incident. She only gained courage a few days later after going to church to pray and decided to tell the truth. Her explanation is believable.

27. Unfortunately Mama Gift, as per the evidence of the complainant, passed away before the conclusion of the trial and it cannot be speculated what her evidence could have been had she testified. I do not find anything wrong with the complainant’s delay in reporting the incident to her father.

28. On the Appellant’s claim that his defence was not considered and that the trial magistrate placed the onus of proving his innocence on him, I find the allegations without merit. The judgment of the trial court shows that the trial magistrate meticulously considered the defence before rejecting the same.

29. I have also given consideration to the Appellant’s defence. His claim that he was framed for disagreeing with PW3 over unpaid water and electricity bills does not make sense. There were seven tenants in that building. It is unbelievable that it is only the Appellant who had a confrontation with PW3 over unpaid water and electricity bills. It is noted that the Appellant was relatively new in the building and if there was indeed a problem with the bills, the other tenants would have taken up the issue before his arrival. The Appellant did not explain why he did not reach out to the landlord over the issue instead of confronting a fellow tenant. Considering the overwhelming evidence adduced by the prosecution, I agree with the trial magistrate that the Appellant’s defence could not be believed.

30. In conclusion, I find that the Appellant’s appeal is without merit. His appeal is dismissed .

Dated and Signed at Nairobi this 11th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Delivered and Signed at Malindi this 28th day of May 2019

R Nyakundi,

Judge of the High Court