



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 43 OF 2018

KM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. **KM** the Appellant herein was charged before the Senior Resident Magistrate's Court Kilungu with the following Offences: **Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act**. The particulars being that the Appellant on 14th day of December, 2016 village within Makueni County, intentionally caused his penis to penetrate the vagina of **NM** a child aged four (4) years.

2. He faced an alternative count of committing an **Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that; the Appellant on the 14th day of December, 2016 within Makueni County, intentionally touched the buttocks/ breasts/ anus/vagina of **NM** a child aged four (4) years with his penis.

3. He pleaded not guilty and the case proceeded to full trial with the prosecution calling six (6) witnesses while the Appellant gave an unsworn statement of defence. At the end of it all, the court found him guilty and convicted him on the principal count of defilement and sentenced him to life imprisonment.

4. The Appellant being dissatisfied has appealed against the whole judgment, raising the following grounds:

- 1) **THAT**, the corroboration of evidence as was held by the trial court was not met due to the fact that none of the prosecution witnesses opined to have told the truth of sight.
- 2) **THAT**, the prosecution case was riddled with lots of malice, contradictions and inconsistency which could have been looked upon before arising to the decision to convict.
- 3) **THAT**, the particulars of the main charge giving rise to the conviction is defective because it does not tally with the evidence adduced in the support.
- 4) **THAT**, the trial court failed to give his defence adequate consideration.
- 5) **THAT**, the trial court failed to observe, analyze and evaluate the entire evidence and find that there was no evidence to convict.

5. A summary of the prosecution case is that a minor called **NM** who is also related to the Appellant was given Kshs.50/= and bread and asked by the latter to follow him to the shamba.

Pw3 NM a sister to the Appellant saw them and alerted **Pw4 WK**, who went to the scene and found the Appellant lying on top of the said minor.

The minor had no pant while the Appellant had also removed his trouser. She asked the Appellant what he was doing to the child and he stood up, wore his trouser and left.

6. The minor could not walk properly saying she was in pain. **Pw5 Hannington Mumbua** a clinical officer at Kilungu District Hospital confirmed that a minor going by the names **NM** was treated at their Hospital vide **OP No. [particulars withheld]**. The findings were that her hymen was broken and she had lacerations in her genitalia. Epithelial cells were noted through a high vaginal swab, but no semen was observed. He produced the treatment card and P3 form in respect of the complainant as EXB 1 and 3 respectively.

7. **Pw6 No. 105528 Pc (W) Edina Melina** is the investigating officer and she received the complainant, Appellant and some witnesses in respect to this matter. She organized for the complainant and Appellant to be taken to the hospital. Upon interrogation, she received Kshs.50/= from the complainant who said the same had been given to her by the Appellant before defiling her.

8. The Appellant in his unsworn defence denied the charge saying he was arrested on 24th December, 2016 under unclear circumstances. He was taken to the police station and while there, he saw his cousins come with a girl, with whom he was taken to hospital.

9. During the hearing of the Appeal, the Appellant submitted that the charge sheet was defective as the person who testified as the complainant (Pw 1) was not the one whose name appeared in the charge sheet. He also stated that the complainant who testified was aged 6-7 years while the real complainant was aged four (4) years.

10. He complained of having been denied a fair trial since he conducted the trial without witness statements. That he was denied the services of a defence lawyer which contravenes Articles 23 (1), 27 (1) and 159 (2) of the Constitution. He raised issue with the evidence of the witnesses (Pw 1 – Pw4) which he argued was inconsistent. Finally, he submitted that his defence was not considered, by the trial court.

11. In reply M/s Owenga for the State opposed the Appeal submitting that the evidence by the prosecution was over whelming and the Appellant had been placed at the scene. That the ingredients of age, penetration and identity had been proved. Counsel argued that there was no serious issue raised on age and inconsistencies by the Appellant.

12. This is a first Appeal and this court has a duty to reconsider the evidence afresh and arrive at its own conclusion. The court must bear in mind that it did not see nor hear the witnesses. It must therefore give an allowance for that. **See Okeno –v- R 1972 EA 32; Patrick & Another –v- R (2005) 2 KLR 162; Muthoko & Another –v- R (2008) eKLR.**

13. Having considered the evidence on record, grounds of appeal, submissions by both parties and the cited authorities, I have singled out one issue which may determine this Appeal. The issue has been submitted on having been raised by the Appellant as ground No. 3 in this judgment namely:

“That the particulars of the main charge giving rise to the conviction is defective because it does not tally with the evidence adduced in support.”

14. The charge sheet in both the principal and alternative counts states that the complainant is **NM** aged four (4) years. However, the witness who testified as the complainant introduced herself as **EN** (Pw 1). She did not know her age but according to the clinical officer (Pw5) the age assessment showed Pw1's age to be between 6-7 years.

15. If indeed **NM** and **EN** was one and the same person, the charge sheet ought to have been amended to accommodate that information. Section 275 of the Criminal Procedure Code avails that opportunity to both the court and the prosecution by providing the following:

(2) Where, before a trial upon information or at any stage of the trial, it appears to the court that the information is defective, the court shall make an order for the amendment of the information as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and any amendments shall be made upon such terms as to the court shall seem just.

(3) Where an information is so amended, a note for the order for amendment shall be endorsed on the information, and the information shall be treated for the purposes of all proceedings in connexion therewith as having been filed in the amended form.

16. Had the learned trial magistrate and the learned prosecuting counsel been keen, this evidence could have been corrected at the appropriate time. In spite of this issue having been raised and submitted on by the Appellant, the Respondent's counsel M/s Owenga did not address the court on it.

17. As things stand now and as rightly put by the Appellant, it is not clear who the real complainant is in this case. Pw2 referred to **EN** before the court as the complainant. That was Pw1 who had just testified. Pw3 and Pw4 slightly referred to a **N**. It's not clear whether the said **N** was **NM** or **EN** On the other hand, Pw5 who produced the medical reports referred to **NM** who is not Pw1, as the person who was examined. Equally the investigating officer (Pw6) slightly talked of a **N** with no other name.

18. It therefore became imperative for the prosecution or the trial court to clarify the position by calling for an amendment of the charge sheet. Failure to do so, created a scenario where the Appellant was not clear on who the complainant was, hence making it difficult for him to adequately prepare for his defence.

This is a technicality that goes to the root of this case and the Appellant will benefit from it in spite of the overwhelming evidence adduced.

19. Having found so, I do not see the need of dealing with the rest of the grounds of appeal. The result is that the appeal succeeds and is allowed. **The conviction is quashed and sentence set aside.**

Orders accordingly.

DELIVERED, SIGNED & DATED THIS 24TH DAY OF MAY 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE