



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 450 OF 2010

MKALA NDURIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Kwale Senior Resident Magistrate's Court

Criminal Case No. 1652 of 2008 delivered by E. K. Usui Macharia, Senior Resident Magistrate, on 7th October, 2010)

JUDGMENT

1. The appellant was charged with the offence of defilement of a girl contrary to Section 8(2) of the Sexual Offences Act. The particulars of the charge are that on the 7th day of November, 2008 at around 3:00 a.m., at Vanga location in Msambweni District within Coast Province, defiled MP [name withheld] a girl aged 10 years.

2. The appellant was duly convicted after a trial and sentenced to serve 30 years imprisonment on 7th October, 2010. The appellant being dissatisfied with the conviction and sentence filed a petition and grounds of appeal on 18th October, 2010. On 7th March, 2019 the appellant amended his grounds of appeal, with leave of the court.

3. It emerged that when the appeal was placed before Odunga J, on 11th December, 2018 for hearing during a service week, a part of the lower court proceedings had not been typed. The said Judge therefore ordered for the proceedings that had been omitted to be availed to enable the hearing of the appeal. On 7th March 2019, the appellant's submissions filed on 24th September, 2018 and 10th December, 2018 as well as the respondent's submissions filed on 18th October, 2018 were expunged from the record to pave way for the filing of new submissions.

4. In his amended grounds of appeal, the appellant raised the following issues:-

(i) The Trial Magistrate erred in law and fact by convicting and sentencing him without considering that the charge sheet was defective;

(ii) The Trial Magistrate erred in law and fact by convicting and sentencing him without considering that the age of the complainant was not proved beyond reasonable doubt as required by law;

(iii) The Trial Magistrate erred in law and fact by not considering that there was poor investigation and the evidence of the witnesses who testified incredible;

(iv) The Trial Magistrate erred in law and fact by not conducting voir dire examination as required by law; and

(v) The Trial Magistrate erred in law for convicting the appellant on the wrong Section of the law.

5. The appellant filed his submissions on 2nd April, 2019 to support his amended grounds of appeal.

6. The respondent's Counsel, Ms Marindah, filed her submissions on 21st March, 2019 to oppose the appeal. The appellant filed a response to the respondent's submissions on 2nd April, 2019.

7. In his submissions, the appellant raised the issue of the age of the complainant by stating that the evidence adduced as to her age was contradictory. He stated that PW1 said her age was 13 years while her mother said that she was 12 years. The appellant pointed out that the P3 form produced by PW4 gave a different age. The appellant submitted that the age of PW1 was not proved as no documentary evidence was produced.
8. The appellant also submitted that PW1 was not subjected to voir dire examination, yet she was a child of tender age. He relied on the case of **Oloo vs Republic** [1960] EA 86 and **John Muiruri vs Republic** [1983] KLR 445. He also relied on the provisions of Section 19 of the Oaths and Statutory Declarations Act on the requirement for the court to ascertain if a child of tender age should give sworn or unsworn evidence.
9. The appellant argued that the charge was defective as he was charged under the provisions of Section 8(2) the Sexual Offences Act. He cited the case of **Mutitnda Mwai Mutana vs Republic**, Mombasa High Court Criminal Appeal No. 282 of 2008 to support his argument.
10. He also submitted that important witnesses were not called by the prosecution. He referred to a witness by the name Mango Maganga who is said to have caught him at the door. He referred to the case of **Bukenya vs Uganda** [1972] EA on the importance of the prosecution availing all the witnesses it considers necessary or else failure to do so may in an appropriate case lead to an inference that evidence of the uncalled witness could have been adverse to the prosecution.
11. The appellant submitted that he was convicted under the provisions of Section 215 of the Criminal Procedure Code, which was erroneous, as the said provision makes no reference to the offence of defilement. He referred to the case of **Muturi vs Republic**, Nairobi High Court Criminal Appeal No. 559 of 2003.
12. In her submissions, Ms Marindah, Prosecution Counsel, admitted that there was contradictory evidence on the age of PW1 as to whether she was 13, 12 or 10 years old. Counsel relied on the information contained on the P3 form which gave the estimated age of PW1 as 10 years after she was examined by a Clinical Officer, following the defilement.
13. Ms Marindah relied on the case of **Francis Omuroni versus Uganda**, Court of Appeal Criminal Appeal No. 2 of 2002 where the Ugandan Court of Appeal said that the Doctor is the only person who could professionally determine the age of a victim of defilement in the absence of any other evidence. The said decision further stated that apart from medical evidence, age may also be proved by a birth certificate, the victim's parents or guardian and by observation and common sense.
14. On the issue of the Magistrate's failure to conduct voir dire examination, Ms Marindah relied on the case of **Maripett Loonkok vs Republic** [2016] eKLR, where the Court of Appeal held that failure by a Trial Court to conduct voir dire did not vitiate the trial therein, as it would depend on the circumstances of each case.
15. On the failure by the prosecution to call the PW2's neighbours who went to their house after the alleged defilement of PW1, the prosecution fell back to the provisions of Section 143 of the Evidence Act and submitted that the appellant failed to demonstrate the evidence that the prosecution had in its possession which it withheld in the prosecution of the case. She relied on the case of **Alex Lichua Lichondo vs Republic** [2015] eKLR and **Keter vs Republic** [2007] 1 EA 135, to support her assertion.
16. With regard to the issue of a defective charge, Ms Marindah admitted that the appellant was charged under Section 8(2) of the Sexual Offences Act but in her view, the charge was curable under the provisions of Section 382 of the Criminal Procedure Code. She also submitted that there was nothing wrong with the appellant being convicted in accordance with the provisions of Section 215 of the Criminal Procedure Code.

ANALYSIS AND DETERMINATION

17. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced before the Trial Court and arrive at its own independent decision. In **Kiilu vs Republic** [2005] 1 KLR 174, the Court of Appeal stated thus:-

“1. An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

The evidence tendered before the Trial Court

18. The evidence tendered before the court below was that on the night on 9th November, 2008, PW1, MJ [name withheld] was sleeping with her 2 sisters. At about 3:00a.m., she felt pain on her chest and in her private parts. She had slept with no clothes. She screamed and a man started to run out of the house.
19. PW1's evidence was that her father quickly woke up as the man ran out of the door. She stated that her father and mother caught the man at the door. When they lit the lamp, they saw it was the appellant. He was taken to Jago Police Post and later to Lungalunga Police Station.
20. PW1 stated that she was bleeding from her private parts. She was examined in Hospital. She stated that the door to their house is made of iron sheet and they had locked it from inside. She testified that neighbours went to their house after she screamed. She said that she was 13

years old as at the time she testified on 31st December, 2009.

21. PW2, ZM [name withheld] was PW1's mother. She stated that PW1 was 12 years old as at the time she was testifying in court. It was PW2's evidence that on 7th November, 2008 at 3:00a.m. (reference made to handwritten proceedings) she heard PW1 screaming as she said "Mtu huyu". She woke up fast and met someone rushing out of the children's bed. She stated that the man was wearing a white shirt which she held onto as he struggled to free himself.

22. PW2 testified that neighbours responded and the appellant was caught by Mango Maganga Mango at the door as PW2 was still holding him. PW2 stated that she put on the lamp and examined PW1's private parts. She saw a discharge and that she was bleeding on the said parts. At 6:00a.m., they took the appellant to the Police Station. PW1 was examined at Msambweni Hospital where a P3 form was filled.

23. PW3, Esther Pendo Karisa, a Senior Clerical Officer at Msambweni District Hospital examined PW1 on 11th November, 2008. She found that her hymen was torn and reddish. She had pus draining from her vagina. A vaginal swab showed red blood cells and pus cells. PW3 started PW1 on ARVs although she was HIV negative. She produced PW1's P3 form as exhibit 1.

24. PW4, No. 84147 PC Murimi of Lungalunga took over the investigation of this case from PC Musuku who was transferred to Nairobi. He stated that he was informed that the appellant had defiled PW1 but was arrested at the scene.

25. In his defence, the appellant denied having committed the offence. He indicated that the charge was a fabrication made by PW2 whom he had seen taking beer and that she asked him never to inform her husband what he had seen. He further said that in the year 2008, he sold his land and went to collect his money on the 8th November, 2008 and that is when he saw PW1 taking beer. He stated that before he reached the buyer's land, PW2's husband found their children crying and he asked where PW2 was. The appellant explained to the Trial Court that PW2 then claimed that he had committed the offence because she thought he had reported her to her husband.

26. The issues for determination are: -

(i) If the age of PW1 was established;

(ii) If the charge was defective;

(iii) If failure to call some witnesses weakened the prosecution's case;

(iv) If failure to conduct voir dire examination was fatal to this case;

(v) If the appellant was convicted under the wrong provisions of the law;

(vi) If the prosecution proved its case beyond reasonable doubt; and

(vii) If the sentence was harsh or excessive.

If the age of PW1 was established

27. At the time PW1 testified in court on 31st December, 2009, she stated that she was 13 years old. Her mother, PW2 said that she was 12 years old. PW1's P3 form on page 3 gave her estimated age as 10 years on 11th November, 2008 when she was examined.

28. In this case, no document such as a Child Health Card, age assessment report or birth certificate was produced as proof of age. The Court of Appeal in the case of **Evans Wamalwa Simiyu vs Republic** [2016] eKLR, relied on Part "C" of the P3 form to establish the apparent age of a victim of defilement for purposes of determining the penalty to mete out to the offender therein. The said court stated as follows:-

"As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of that information. The complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where the actual age is not known means apparent age. This means that in the Doctor's opinion the apparent age of the complainant from his observation was 12 years. Thus although the actual age of the minor complainant was not established the apparent age was established as 12 years. This means her actual less her or more (sic) and this was sufficient to bring the complainant within the age bracket of 12 - 15 years for the purposes of the penalty under section 8(3) of the Sexual Offences Act."

29. In this court's considered view, going by the P3 form, the age of PW1 as at the time the offence was committed was 10 years, that is the same age reflected on the charge sheet. The Hon. Magistrate was of the view that PW1 was 11 years old but no proper explanation was given on how the said age was arrived at. As indicated in Section "C" of the P3 form, I hold that the apparent age of PW1 was established to be 10 years.

If the charge was defective

30. There is no doubt that the charge as framed was defective. The appellant was charged under the provisions of Section 8(2) of the Sexual Offences Act, which is the penal section, whereas he should have been charged under the provisions of Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

31. The appellant went through a full trial and competently cross-examined prosecution witnesses. He understood the offence he had been charged with was one of defilement. The one thing he might not have understood was the nature of the sentence that he stood to face if he was convicted. Although the charge filed against him was defective, it is my finding that it was curable under the provisions of Section 382 of the Criminal Procedure Code (CPC) which states as follows:-

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice;

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised that an earlier stage in the proceedings.....”

32. I hold that the fact that the charge was defective did not vitiate the trial in the lower court. The Trial Magistrate in her Judgment found the appellant guilty of defilement contrary to section 8(2) of the Sexual Offences Act, 2006. The foregoing is in tandem with the age of PW1 which was established to be 10 years.

If failure to call some witnesses weakened the prosecution's case

33. The appellant faulted the prosecution's failure to call the witnesses who were referred to as PW1 and PW2's neighbours, who went to their house on the night of the incident. This court notes that the said persons were not present in the house of PW2 when PW1 was defiled. If anything, PW2 played a pivotal role of holding onto the appellant when PW1 screamed for help. There was no evidence that she let him out of her sight. I therefore agree with Ms Marindah, Prosecution Counsel, that a superfluity of witnesses would have served no useful purpose.

34. On the prosecution's failure to call some witnesses, the Court of Appeal in the case of **Alex Lichua Lichodo vs Republic** [2015] eKLR, made reference to the case of **Julius Kalewa Mutunga vs Republic**, Criminal Appeal No. 31 of 2005 where the Court held as follows:-

“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

35. In the present case, I do not find any ill motive on the part of the prosecution in failing to call more witness than it did. I therefore hold that the above issue is without merit.

Failure to conduct voir dire examination.

36. There is no doubt that the Trial Magistrate failed to conduct a voir dire examination as provided under the provisions of Section 19 of the Oaths and Statutory Declarations Act. Different courts have dealt with the said issue in different ways. The Court of Appeal in the case of **Maripett Loonkomok vs Republic** [2015] eKLR held as follows with regard to the failure of a Trial Court to conduct voir dire examination:-

“We turn to consider the effect of failure by the trial court to administer voire dire on the complainant. It is firmly settled that it is not in all cases that voire dire is not administered or is not properly administered that the entire trial would be vitiated. The Court sitting in Nyeri has recently reiterated what has been said many times before that the question will depend on the peculiar circumstances and particular facts of the each case.”

37. In the present case, although voir dire was not conducted, PW1 testified competently and was consistent in her evidence. She was cross-examined at length by the appellant and she was not swayed under the rigours of cross-examination. It is therefore my finding that failure to conduct a voir dire examination with regard to PW1 did not in any way prejudice the appellant.

If the appellant was convicted under the wrong provisions of the law.

38. The appellant submitted that he was convicted under the provisions of Section 215 of the Criminal Procedure Code (CPC). Section 215 of the CPC provides as follows:-

“The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law or shall acquit him.”

39. In the Judgment, the Trial Magistrate stated as follows:-

“I find the charge proved beyond reasonable doubt and find the accused guilty of the offence termed defilement contrary to Section 8(2) of the Sexual Offences Act No. 30 of 2006. He is convicted in accordance with Section 215 of CPC.”

40. This court having read the above extract as whole finds that an interpretation of the same cannot by any extent mean that the appellant was convicted for an offence under Section 215 of the CPC. It is clear to this court that the Trial Magistrate convicted the appellant in accordance with the provisions of Section 215 of the CPC for the offence of defilement contrary to Section 8(2) of the Sexual Offences Act and not vice versa. The appellant's argument on the said issue was therefore unfounded and a non-starter.

If the prosecution proved its case beyond reasonable doubt

41. The prosecution's case was straight forward. PW1 had slept without clothes on the night of 7th November, 2008. She felt some pain on her chest at about 3:00 a.m., in the night. She also felt some pain in her private parts. She screamed and her mother went to her rescue. She got hold of the shirt of the man who had gained access to the room where PW1 and 2 of her other children were sleeping. Members of the public came to the scene and the appellant was identified after a lamp was lit.

42. On cross-examination, PW2 said that the appellant was not wearing an underwear or his trousers, which he attempted to pull up when PW2 went to assist PW1.

43. There is no doubt from the evidence of PW1 and PW2 that the appellant was caught inside PW2's house. He had no business being there at night. PW1 was bleeding from her private parts when PW2 examined her.

44. On being examined at Msambweni District Hospital, it was established that PW1's hymen was torn and hyperemic. Pus was draining through her vaginal orifice. Numerous red blood cells, pus cells and moderate epithelial cells were observed when a vaginal swab was taken. All the foregoing bears credence to PW1's evidence that she was defiled. The perpetrator of the offence was without a doubt the appellant. It is my finding that he was properly convicted. His defence was considered but it could not dislodge the prosecution's case. I find it to be full of falsehoods.

If the sentence was harsh or excessive

45. The appellant was sentenced to serve 30 years imprisonment. PW1 was 10 years old and for a victim of such an age, the sentence provided for in an offence of defilement is life imprisonment, under Section 8(2) of the Sexual Offences Act.

46. The sentence that was meted out against the appellant was lawful. I see no valid reason why I should interfere with the same. The result is that the appeal against conviction and sentence is hereby dismissed. The appellant has 14 days right of appeal.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 28TH DAY OF JUNE, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Marindah, Prosecution Counsel for the DPP

Mr. Oliver Musundi - Court Assistant