



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 11 OF 2017

DAVID MUYALE CHESA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment dated 30th March 2017 by Hon. Z Abdul, RM, in CMCr Case No. 38 of 2016, Naivasha,)

JUDGMENT

1. The accused was charged and convicted for the offence of defilement contrary to section 8(1) as read with **section 8(3) of the Sexual Offences Act No. 3 of 2016**. The particulars of the offence were that the accused on the 25th June 2016 at [particulars withheld] in Naivasha sub-county within Nakuru County intentionally and unlawfully caused his penis to penetrate the vagina of MWC aged 15 years. He was sentenced to 20 years in prison.

2. Dissatisfied by the lower court's decision the appellant filed a petition of appeal on 5th April 2017, seeking that the conviction be quashed and sentence set aside. He subsequently, filed amended grounds of appeal on 31st July 2018, and, through counsel, he filed oral submissions at the hearing.

3. The appeal raises three issues, namely: Whether the complainant's age was proved; whether penetration was proved; and whether, overall, the prosecution proved its case beyond reasonable doubt. The grounds of appeal are as follows:

1. That the trial Magistrate erred in law and in fact by convicting the appellant in a prosecution case where age was not conclusively proved.

2. That the trial Magistrate erred in law and fact by convicting the appellant but failed to note that penetration was not proved against the appellant.

3. That the trial Magistrate erred in law and fact in convicting the appellant on basis of assumptions, presumptuous matters, unsettled facts and conclusions un-established by evidence.

4. The oral submissions of counsel are not entirely aligned with the grounds of appeal. They focus on the following complaints: that the P3 form was not produced by its maker and no reasons were given for this, nor were the treatment notes availed; that the findings of the P3 were not related to the offence; that the victim appears to have been traced on 27th June, 2016, two days after the alleged incident; the contradiction that the P3 form was said to have been given on 26th June 2016 after the complainant had been examined and the effect of that evidence on the genuineness of the form; the unlikelihood of the offence being committed in broad daylight and yet no witness were available to confirm this other than the complainant's mother; that the clothes exhibited as Exhibit 4 were never identified by the complainant; and finally, that the complainant's evidence ought to have been corroborated and penetration proved.

5. The state opposed the appeal and counsel made oral arguments reiterating the evidence.

Proof of Age of the Complainant

6. The appellant argues that the complainant stated that she was 16 years old having been born in December 2000; that PW2 also that the victim was 16 years old, but PW3 stated that the victim was 15 years old when the P3 form was filled. He also states that PW4 availed a birth notification showing that the victim was born on 23rd December 2000 and was thus 15 years old which is confirmed in the charge sheet, noting that this was contradictory. He points out that there are different sentences for defilement of a child of 15 years and that for a 16 year

old, a fact not taken into account by the trial magistrate.

7. I have carefully perused the record on these issues. It is true that the witnesses stated different ages of the complainant. The best evidence of age is a birth certificate. PW4, the investigating officer produced Exhibit 3, being a copy of notification of birth of the complainant. It shows that she was born on 23.12.2000, whilst the defilement occurred on 25th June 2016, and was therefore 15 years and six months old at the time of the defilement, notwithstanding what any other witness or document may have said. This is not a contentious issue as both the charge sheet states she was 15 and the sentence meted was that applicable to a 15 year old victim.

8. There are numerous cases that deal with the question of proof of age, including: *Musyoki Mwakavi v Republic [2014] eKLR* held that:

“...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim’s parents or guardian and observation or common sense...”

9. Similarly, in *Francis Omuroni versus Uganda Court of Appeal 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 any 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...”

10. On age, it appears to me that there is nothing requiring further inquiry, as the issue was resolved by the birth notification.

Whether penetration was proved: medical evidence

11. The appellant submitted that there was nothing to link him to the defilement, the complainant having testified that she never told anyone of the incident. Thus, it made no sense why he was arrested and charged with defilement. He pointed out various reasons can be ascribed to a broken hymen, and it was wrong for the medical officer to conclude that victim was defiled yet she did not say so.

12. Further, he submitted that the medical evidence availed was not produced by the maker in respect of the P3 and the PRC form, and he was therefore unable to cross examine properly. In addition, the fact that the victim’s stained clothes were produced as Exhibit 4 in court by PW4, but neither PW1 nor PW2 mentioned anything about the clothes or identified them, nor was it demonstrated that the victim was asked to take the clothes to the police.

13. My perusal of the evidence leads me to the conclusion that there was some kind of romantic relationship between the accused and the complainant which was not disclosed in the general evidence of the complainant or her mother. The Clinical Officer produced the PRC Form. In the part entitled, “circumstances surrounding the incident” the PRC states:

“The survivor reports to have gone to the man’s house, offered a meal(?) [meal?] and had consensual sex who then spent a whole night ; left the girl the next morning , locked the house but the girl managed to escape.....”

14. The PRC form shows that the complainant’s hymen was broken, and a high vaginal swab disclosed non motile spermatozoa under a microscope. Similarly, the P3 form showed a broken hymen, inflamed outer genitalia and non- motile spermatozoa.

15. The answer to the complaint that the makers of these forms were not called to testify is contained in the record of proceeding where the prosecutor stated that he had a Clinical Officer, Naivasha District Hospital, to produce the P3 form on behalf of her colleague June Njoroge, the maker. The accused said he had no objection, and the application was allowed. The Clinical Officer, PW3 stated that she knew the hand-writing of June Njoroge, the maker, having worked with her for four years. She stated that her colleague had been assigned other duties in the new born section of the hospital.

16. There are two points to note about the Clinical Officer’s evidence. First, its introduction was not objected to. Second, the **Evidence Act Section 77** allows a report of a medical practitioner to be used in evidence. **Section 77(2)** thereof allows the court to presume the signature on such document to be genuine. Third, a proper basis was laid explaining the absence of the maker of the report.

17. The foregoing notwithstanding, the P3 Form must normally be produced by its maker. The Court of Appeal so held in *Sibo Makovo v Republic, Criminal Appeal [1997] eKLR*, stating:

“The P3 form was filled in by the Medical Officer, Naivasha District, was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in section 33 of the Evidence Act (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in courts is to be taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called.”

18. Further, in *George Kioji vs. R - Nyeri Criminal Appeal No. 270 of 2012 (unreported)* the court held that-

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an

accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.” (Emphasis supplied).

19. In my view the medical evidence proves beyond reasonable doubt the fact of penetration.

20. In addition, the accused testified that the complainant was his girlfriend and had asked her to bear a child for him, but they had disagreed and he parted ways with her. She was therefore avenging the break-up. Her story that she had been locked in by the accused and could not escape does not entirely add up. She appears not to have screamed to alert passers-by; she spent two nights in his house, allegedly in fear. Meanwhile, her mother had been looking for her for two days and even reported to Karagita police station that her daughter was missing. When the complainant got home she did not report the incident to her mother because, she said, she allegedly feared.

21. My view of the whole scenario is that the complainant went off and had a good time with the appellant. Unable to explain her absence, she came up with the story that she was sexually assaulted through force, which story I am unable to buy.

22. Nevertheless, the offence of defilement is committed when a person causes penetration with a child as defined in the Sexual Offences Act.

23. The prosecution was not obligated to call many witnesses or produce many exhibits to prove the offence. The evidence of the victim alone is sufficient as long as the court believes such evidence beyond reasonable doubt. The prosecution called other witnesses who corroborated the evidence of the complainant and the trial magistrate found it believable, finding the appellant guilty.

Whether the prosecution proved their case

24. I have considered the submissions that the evidence was marred by contradictions and assumptions. The failure of the complainant to scream is explained by either the threats her fear and allegedly given her, or by the fact that she was having a good time. The evidence allows for either of those conclusions.

25. The argument as to whether or not the complainant knew the appellant appears to me to be a non-issue. She stated in her oral testimony that she did not know the appellant. I

26. However, in the P3 Form it is indicated that she alleged she had been lured and defiled by a person well known to her. Likewise in the PRC Form it is indicated that she was allegedly sexually assaulted by a known person, and further, that she reported she had consensual sex with a man with whom she spent the whole night. For purposes of the offence of defilement, knowledge of the offender or lack of it is immaterial. There were complaints of other minor discrepancy or omission, which I do not think go to the root of the case, and were insufficient to shake the evidence of the complainant and the prosecution witnesses.

27. Having evaluated all the evidence in its totality, I am satisfied that there was evidence that the appellant penetrated the complainant who, at the time of the offence, was a child of fifteen years. I am satisfied that the prosecution case was proved beyond reasonable doubt, and there no basis for interfering with the lower court's judgment.

28. Accordingly, the appeal is hereby dismissed.

29. Orders accordingly.

Dated and Delivered at Naivasha this 29th Day of July, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mburu F. I. holding brief for the Appellant
2. Ms Abuga for the State
3. David Muyale Chesa - Appellant - present
4. Court Clerk - Quinter Ogutu