REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 133 OF 2018

ONESMUS MUMO KIWEU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence by (Hon. C. A. Ocharo, PM), in Machakos Chief Magistrate's Court in Criminal Case SOA No. 31 of 2017 and judgement delivered on 1.11.2018)

BETWEEN

REPUBLIC .....PROSECUTOR

VERSUS

ONESMUS MUMO KIWEU.....ACCUSED

JUDGEMENT

1. This is an appeal from the judgement, conviction and sentence of Hon. C.A. Ocharo, Principal Magistrate in Criminal Case SOA No. 31 of 2017 on 1.11.2018. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the appellant "On the 4th day of December, 2017 at [particulars withheld] in Machakos sub-county within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of **KN** a child aged 17 years. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. When the matter came up for trial, the appellant pleaded not guilty hence warranting a trial. In this regard the prosecution presented 5 witnesses so as to establish the guilt of the appellant. Pw1 was KM who told the court that she was a standard 8 pupil at [particulars withheld] and she was not sure of her age. It was her testimony that in early December, 2017 she was on her way back home when she met a person who took her to someone's house and removed her inner wear and he hurt her then she fell from the bed and injured her rib. She told the court that the person was called Mumo and that after the incident she told her mother who took her to hospital. On cross-examination, she identified the appellant as Mumo 'wa' hoteli'.

3. Pw2 was JKN who testified that on 4.12.2017 she noticed Pw1 was crying and walking with her legs apart whereupon Pw1 informed her that Mumo had removed her pants and defiled her. She told the court that she went and reported to the police station and then went to hospital where the doctor confirmed that she had been defiled and issued a P3 form. She told the court that the complainant was bleeding and that the appellant was a shopkeeper who was arrested by Nyumba Kumi representatives. On re- examination, she testified that she did not have any problem with the appellant.

4. Pw3 was Paul Mutua who told the court that he received a call on 4.12.17 that the appellant had raped the complainant and he arrested the appellant at his work place and took him to the police station.

5. Pw4 was Dr. Mutunga, a clinical officer at Kathiani Hospital who testified of an examination that was carried out on the victim on 11th January, 20118 and it was found that her private parts were swollen and tender, her hymen was torn and she was bleeding from her vagina. She was mentally retarded. The victim was examined by Dr. Anne and the PRC form that was filled on 5.12.2017 was tendered in evidence together with the P3 form.

6. Pw5 was No. 100503 Pc Nancy Akumu who testified that she was assigned to investigate the instant case and that the victim informed her

that the appellant laid her on the ground and removed his clothes and penetrated her vagina and thereafter the appellant dressed and left. She recorded the statement and presented in court the birth notification that was marked for identification in respect of Pw1 who is indicated as having been born on 29.2.2001. The court found that the appellant had a case to answer and he was put on his defence.

7. The appellant opted to give an unsworn statement and called his wife as a witness. The appellant told the court that on the material day he went to work then went to a *changaa* den and later he was approached by Pw1's brother who told him that he had defiled Pw1 and in the evening he was arrested. Further he told the court that his property was destroyed while he was in custody.

8. Dw2 was VMM who told the court that on the material day she was working with the appellant and later she saw the appellant being arrested. She stated on cross-examination that she and her husband bought land in the area and it brought envy and that there was bad blood between her and the complainant's mother who had a debt in the appellant's shop The trial court found that there was sufficient evidence that the appellant defiled Pw1; that she believed the testimony of Pw1 and placed reliance on the case of **Mohammed v R (2006) 2KLR** and Section 124 of the Evidence act. After considering mitigations she sentenced the appellant to 15 years imprisonment.

9. The appeal was canvassed vide written submissions. It is the appellant's case that the prosecution did not prove its case beyond reasonable doubt. It is also his case that the trial court went into error relying on a charge sheet that was defective and further that the prosecution's evidence was contradictory. The appellant submitted that the trial court went into error in failing to conduct a voir dire and in failing to indicate what language was used in conducting the trial. Reliance was placed on the case of **Johnson Muiruri v R (1983) KLR 445** and Section 124 of the Evidence Act as well as Section 19 of Cap 15. Further he submitted that there were contradictions in the evidence of Pw1 who told the court that she was defiled on a bed and on cross-examination she told the court that she did not lie on the bed. It was his submission that the prosecution evidence was uncorroborated; that there was no evidence of the time of commission of the offence and that the age of the victim was not proven and that the medical evidence did not connect the appellant to the offence, neither was he identified as the perpetrator of the offence and therefore his appeal be allowed, the conviction quashed and the sentence set aside.

10. The state submitted that the contradictions as to the venue of the incident are not material to affect the outcome of the case. Counsel submitted that penile penetration was not proven; the account of the victim as per the evidence on record failed to prove the same hence invited the court to make a finding that there was an indecent act on a minor and that the sentence of the appellant be reduced.

11. This being first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses.

12. The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal and the amended grounds may be collapsed into three grounds:

> ***1. That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;***
>
> ***2. That the trial magistrate erred in convicting the Appellant yet the charge sheet was defective;***
>
> ***3. That the trial magistrate erred in failing to conduct a voir dire.***

13. In cases of defilement the following are to be proven:

1. ***The age of the child.***
2. ***The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and***
3. ***That the perpetrator is the Appellant.***

14. Having considered this appeal and the rival submissions, it is undisputed that the complainant was a person below 18 years as she was aged 17 years as per the health card indicative that she was born on 29.2.2001. It is also undisputed that there was penetration because the evidence on record points towards penetration and this was indicated on the P3 form that was uncontroverted by the appellant. There is however contention on the issue of identification of the appellant as the perpetrator. Pw1 told the court that in early December, 2017 she was on her way back home from school when she met a person who took her to someone's house and removed her inner wear and he hurt her then she fell from the bed and injured her rib. She told the court that the person was called Mumo and that after the incident she told her mother who took her to hospital. On cross-examination, she identified the appellant as Mumo 'wa hoteli'. The appellant seems well known to the family of Pw1 but however the defence alludes to a defence of alibi hence casting doubt on the occurrence of the event and or the participation of the appellant. From the evidence on record, the court is not able to say with certainty that the appellant was properly identified as the perpetrator.

15. I did not have the benefit of seeing the witnesses testify but however from the proceedings and the court record, the trial court seemed satisfied of the evidence against the appellant that was given by a single witness. The learned trial magistrate relied on Section 124 of the Evidence Act and the case of **Mohamed v R (2006) 2 KLR 138** in believing the evidence of the complainant and having considered the surrounding circumstances that earlier in the day the appellant was said to be at his shop, I am unable to agree with her decision. It is on this basis that the law had set a standard of proof in criminal cases.

16. This standard of proof of "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a

person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (**see Clarence Victor, Petitioner 92-8894 v. Nebraska, 511 U.S. 1 (1994); Rex v. Summers, (1952) 36 Cr App R 14; Rex v. Kritz, (1949) 33 Cr App R 169, [1950] 1 KB 82 and R. v. Hepworth, R. v. Feamley, [1955] 2 All E.R. 918**).

17. Beyond reasonable doubt is proof that leaves the court firmly convinced the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt.

18. It is indicated in the medical report, exhibit P.Ex.2, the P3 form that Dr. Mutunga found the victim's hymen was broken. The PRC form that was relied upon to fill the P3 form indicates that there was bleeding and it was reported that there was onset of menses. Since the P3 form does not indicate that the rapture was recent and the source of the bleeding is not disclosed. The PRC form alludes to onset of menses and hence the prosecution's case rests on what is essentially circumstantial evidence. It transpired that the complainant was mentally retarded and there was need for caution when accepting her sole and uncorroborated testimony. It was unsafe to rely solely on her testimony as it was necessary to go beyond the provisions of section 124 of the Evidence Act.

19. In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see **Shubadin Merali and another v. Uganda [1963] EA 647; Simon Musoke v. R [1958] EA 715; Teper v. R [1952] AC 480 and Onyango v. Uganda [1967] EA 328 at page 331**).

20. There is no evidence that the appellant was seen together with Pw1. What is there is the account of the victim and there is no other evidence on the part of the prosecution. The defence evidence in this case is that the appellant and his wife were together in their shop and saw persons who came to arrest the appellant and this weakens any inference of guilt on the part of the appellant. The day the victim was medically examined (on 11th January, 2018) by Pw4 who testified she found that Pw1's hymen was ruptured but Pw4 did not express an opinion as to when the rapture occurred and what the probable cause was. The doctor found some bleeding but did not indicate that there were any tears or lacerations to explain the bleeding. The question is whether these pieces of evidence prove beyond reasonable doubt that an act of sexual intercourse took place. In his defence, the appellant denied this element. The PRC form indicated that there was an onset of menses from the victim. No evidence was adduced to the effect that the blood found was as a result of penetration and not due to onset of menses.

21. For a finding of fact to be made based on circumstantial evidence, the court must be satisfied that there are no other co-existing circumstances which would weaken or destroy the inference. I find that neither in the testimony of P.W.1 nor that of P.W.2 is there an element that conclusively proves that sexual intercourse or any other sexual act as defined by section 2 of the Sexual Offences Act occurred. The circumstances do not establish it as a fact that there was contact, let alone penetration, between the sexual organs of the appellant and the victim. There would be corroborative evidence too is inconclusive. The bleeding that was seen by the doctor Pw4, in absence of an explanation as to the cause, and the PRC form does not rule out the possibility of menstruation as the cause. The PRC form also noted that no tears were seen and that the mother of Pw1 reported that there were normal menses. The evidence considered as a whole causes such doubt as would lead a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon. It causes a real and substantial uncertainty with respect to this element of the offence charged and a real possibility that the unlawful sexual act did not take place.

22. The appellant has raised the issue of a defective charge sheet. Section 134 of the Criminal Procedure Code provides as follows:-

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

23. I find it unnecessary to belabor on that issue. The appellant has also raised the issue of contradiction and I agree that there are contradictions but not in the manner stated by the appellant. The PRC form and the P3 form present contradictory evidence. Whereas the PRC form was filled on 5.12.2017 and is comprehensive and seems to have a firsthand account of the victim and her mother, the P3 form was filled on 11.1.2018 almost one month after the alleged incident and it is possible that in that one month there were other interventions that occasioned the torn hymen that was noted by Pw4 that had not been seen by Dr. Jane who filled the PRC form on 5.12.2017

24. From the evidence on record, I am not satisfied that the same is sufficient to sustain a conviction against the appellant who due to the evidence on record has not been placed at the scene of the crime on the material date and the evidence of the complainant does not elucidate that a sexual act took place; she did not tell the court that the appellant penetrated her but merely said that the appellant hurt her. The evidence of penetration came from Pw2 which is hearsay and which cannot be relied upon. I also find that the inconsistency is not in the human recollection of the event but in the medical evidence and the same goes to the root of the case for it touches on one of the elements of the offence; the same is not curable under Section 382 of the Criminal Procedure Code. The conviction of the appellant was therefore not safe.

25. I point out that the respondent's counsel had mentioned that a life sentence was meted on the appellant, however this is not the case. The appellant had been sentence to 15 years imprisonment and not life imprisonment as alluded to by counsel for the Respondent.

26. In the result, I find that the prosecution did not prove its case beyond all reasonable doubt. The appeal has merit and is allowed. The conviction of the appellant is hereby quashed and the sentence is set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Judgement read, signed and delivered in open court at **Machakos** this **29th** day of October, **2019.**

D. K. Kemei

Judge