



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 16 OF 2018

DENNIS KINUTHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both the conviction and sentence imposed by

Learned trial Magistrate Hon. L.N. Juma R.M at Kilifi Law Courts.)

Coram: Hon. Justice R. Nyakundi

Ms Sombo for Respondent

JUDGEMENT

The Appellant herein was charged with an offence of defilement of a girl aged 15 years old contrary to Section 8(1) of the Sexual Offences Act No. 3 of 2006. An alternative charge of committing an incident act with a child contrary to Section 11(1) of the Act was also preferred against him. He was convicted of the main charge and sentenced to fifteen (15) years imprisonment on the 25th of August 2017. Having been dissatisfied by the trial court's decision, the Appellant has levelled several grounds of appeal as follows:

- 1. That the charge sheet was defective.***
- 2. The medical evidence produced was not conclusive and reliable.***
- 3. The age of the victim was not established.***
- 4. That his defence was not considered.***
- 5. That the trial court erred in admitting the evidence of PW1.***
- 6. That DNA testing was useful to ascertain the paternity of the child.***
- 7. That the prosecution did not prove its case beyond reasonable doubt.***

This being the first appeal, the appeal is entitled to a fresh close reconsideration and I shall scrutinize, re-evaluate and analyze the evidence on record and arrive at an independent conclusion. In so doing, this Court will either uphold or reverse the findings of the Learned Trial Magistrate. In doing so, this Court shall bear in mind the fact that it had no benefit of seeing and hearing the witnesses testify during the trial. This entails that any issues raised in this appeal touching on the demeanor of witnesses must rest on the considered opinion of the Learned Trial Magistrate who had the singular privilege of hearing and seeing the witnesses. (**Okeno vs. Republic (1972) EA 32**).

During trial, the Prosecution called a total of six witnesses in support of its case and upon placing the Appellant on his defence he elected to tender an unsworn testimony. I have perused the record of proceedings, the exhibits, the petition/memorandum and grounds of appeal, submissions made in respect of the said grounds of appeal and the submissions filed made by the of Office of the DPP.

Issues for Determination

I have considered the grounds of appeal raised herein, the main issues for determination are that:

(a) Whether the prosecution proved the offence of defilement beyond reasonable doubt.

(b) Whether the charge sheet was defective.

Findings, Analysis and Determination

Whether the prosecution proved its case beyond reasonable doubt

Section 8(1) of the Sexual Offences Act which defines defilement as:

“a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

Section 8(4) provides as follows:

“(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

In view of the foregoing, it imperative for the prosecution to prove beyond reasonable doubt, the penetration, minority age of the victim and to positively identify the perpetrator of the offence or the author of the complainant's misfortune. The definition of the phrase, **“beyond reasonable doubt”** as captured in the case of **Miller-vs-Minister of Pensions (1947) 2 ALL ER 372**, where Lord Denning J held that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt but the evidence should be as strong as to leave only remote possibility in the defendant's favor.

(a) Whether the prosecution proved penetration.

The Appellant complains that the evidence tendered by the prosecution on the issue of penetration was insufficient to prove the offence in question. He argues that the evidence which says there were blood spots and bruises on the complainant goes to show that the penetration was fresh. He also referred to the investigating officer's evidence at page 19 lines 20-21 of the proceedings where the said officer testified that the Complainant told him that she had previously slept with Evans. It is therefore the Appellant's contention that the prosecution failed to establish whether the same was caused by Evans or him.

In response to the foregoing contention by the Appellant, the Counsel for the Respondent Mrs. Lydia Kagori submitted that the medical documents produced before the trial court, that is the PRC and P3 form, as exhibits by Dr. Noor Mohammed were sufficient to prove penetration. The Learned trial magistrate in his judgement made a finding that the documentary evidence produced by the prosecution in support of its case were reliable and conclusive evidence of penetration.

Having carefully perused the record of proceedings, the minor stated that during time she was missing from home, she stayed with the Appellant whom she had sex with. She told the court that she went there as per the appellant's request and that she had been in a relationship with the appellant for four months. She also told the court that she was informed that she was pregnant when she was taken to the hospital and the same belongs to the accused.

I noted that the Appellant questioned the minor's written statement where she stated that the pregnancy belongs to some called Evans. Upon cross examination by the Appellant, the minor stated that she lied that the pregnancy belongs to Evans and she doesn't know anybody by that name. On re-examination, she stated that she just mentioned Evans in her statement.

In my view, the issue to ponder is not whether or not the pregnancy belongs to the said Evans or the Appellant. The issue is whether penetration was proved beyond reasonable doubt. The minor admitted that she had sex. However, on this limb the question not as to whom she had sex with.

The medical evidence produced before the trial court by Dr. Noor Mohamed (PW6) affirmed that there was penetration on the minor's genitalia. The P3 form shows that shows that the hymen was broken and rugged, and the vagina was bruised. The minor was found to be pregnant. Also, blood spots were noted which in the Dr.'s opinion are a sign consistent penetration. The same findings were made in the PRC form produced by PW6.

The foregoing set of facts are conclusive proof of penile penetration. This is further affirmed by the fact that the minor was found to be pregnant. Pregnancy is always a result of sexual intercourse, if not medically done or otherwise is proved. Further, the Appellant in his submission on appeal admitted having had sexual intercourse with the minor but he argues that the same was consensual. It is therefore, this court's finding that the prosecution proved the ingredient of penetration beyond reasonable doubt.

(b) Whether the Appellant was positively identified as the perpetrator.

On Identification, it is well settled that the more reliable mode of identification is recognition. The complainant alleged that she had sexual intercourse with the Appellant when she stayed at his home for about one week. She even mentioned that they were in a four-month-old relationship. PW2, PW3 and PW4 affirmed that the complainant was found in the Appellant house. It is stated that she even tried to run away. They all testified that when they went to the Appellant's house on the first instance, he was very annoyed, angry and even threatened them with a panga. The Appellant then denied to give then the minor. The Learned trial magistrate found this evidence to be credible as the

same was not shaken by the Appellant's testimony.

On appeal, the Appellant admits having been involved in a sexual relationship with the minor. His contention is that he did not lure her into sex and he admitted having been in a relationship with her. He admitted that during the time she was missing, she was at his house. He contends that the prosecution did not offer evidence showing that he forced complainant to escape from her home and added that she willfully did so. To his mind, the complainant acted like an adult.

It is further argued by the Appellant that the medical evidence tendered by the prosecution depicted that the complainant's hymen was rugged which is a sign that there was not fresh penetration and that she was never virgin when he engaged in sexual intercourse with her. The Appellant therefore argued that the evidence of the complainant cannot be relied upon because she was not truthful.

The question to answer is whether the Appellant defiled the complainant. It must be noted that the provisions of Section 8 of the Sexual Offences Act do not make a distinction between consensual and non-consensual sexual intercourse with the minor. As long as the Appellant engaged in sexual intercourse with a child below the age of 18, the offence of defilement suffices. Further, taking into account the circumstances of this case, the question as to whether or not the pregnancy belonged to the Appellant or another person is not in matter for determination by this court since does not take away the Appellant defiled the minor.

And also, the number of people who have defilement the complainant is superfluous. It may in my view, work as an extenuating circumstance upon sentencing but it cannot completely exonerate the Appellant from being liable to the offence.

The rationale for the offence of defilement is the need to protect immature females from voluntarily or involuntarily engaging in sexual intercourse. They lack the capacity to appreciate the implications involved, and the possibility that they may suffer psychic or physical injury. This Court finds that the Appellant was positively identified as the perpetrator of the alleged defilement.

(c) Whether the prosecution established age of the victim.

As I have mentioned earlier, the onus of proving the age of the minor resides with the prosecution. Under section 8(1) of the Sexual Offences Act a person is deemed to have committed defilement if he or she does an act which causes penetration with a child. Under Section 2 (1) of the Sexual Offences Act, the definition of a child is the one assigned in the Children Act. This entails any person of less than eighteen (18) years. The onus of proving age resides with the prosecution. Mwilu J (as she then was) in the case of **Hillary Nyongesa Vs Republic (Eldoret Criminal Appeal No.123 of 2000)** stated that:

“Age is such a critical aspect in Sexual Offences that it has to be conclusively proved.... And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”

Similarly, in **Kaingu Elias Kasomo v Republic; Malindi Court of Appeal Criminal Case No. 504 of 2010**, the court emphasized on the importance of proving the age of the victim of defilement as the sentence imposed upon conviction depend on the victim's age.

In the instant case the PW1 did not mention her age. PW3, the complainant's mother testified that the minor was 15 years old. The Medical Examination Report indicates that the minor was 16 years old. The prosecution produced documentary evidence in form of Child Health Card which shows that the minor was born on 12th March 2000 which means the minor was 16 years when the offence was committed upon her. It is my view that the Child Health Card is one of the most reliable, conclusive and prima facie evidence or proof of age. In that respect, this court finds that the minor was sixteen years old at the time the offence was committed. Hence the same was proved beyond reasonable doubt.

The Upshot

Given the foregoing considerations, it's clear that the offence the appellant was convicted of was proved by the prosecution beyond reasonable doubt. The appeal is therefore not merited. However, at this juncture owing to the recent developments brought about by the Supreme Court decision in **Francis Karioko Muruatetu and another v Republic SC.Pet.16/2015** where the Supreme Court declared Section 204 of the Penal Code that provided for mandatory death sentence, unconstitutional, for reasons that it denied the court discretion in sentencing.

The foregoing reasoning was applied by the Court of Appeal decision of **Jared Koita Injiri v Republic CRA.93/2014** which held that the mandatory sentence stipulated by Section 8(2) of the Sexual Offences Act was unconstitutional. The reasoning in the decision in **Muruatetu** is that mandatory sentences deny convicts the chance to mitigate and that it also takes away the discretion of the court to take into account mitigating and aggravating factors of each individual case so as to mete out an appropriate sentence that is proportionate to the offence.

It is evident that the trial process does not stop at convicting the accused and sentencing is a crucial component of sentencing. Mitigation is an important congruent element of the fair trial. Thus, the Supreme Court of Kenya in **Muruatetu Case** took the view that the fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process.

I have noted that the sentence imposed on the appellant by the trial court was lawful and consequently this court has no jurisdictions to deal with this aspect under the principles by the decision in **Mwaratetu**. So the appeal on sentence therefore lacks merit. As a result the conviction and sentence is well founded to render the entire appeal dismissed.

It is so Ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER, 2019.

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R. NYAKUNDI

JUDGE