



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 9 OF 2019

JOSEPH MAKAU MUASYA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. C.A. Mayamba (SRM) in Kilungu Senior Resident Magistrate's Court Criminal Case No. 44 of 2018 delivered on 15th August 2018.)

JUDGMENT

1. **Joseph Makau Muasya** the Appellant was charged with the offence of **defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 9th day of December 2017 at [Particulars Withheld] Village, Kilungu location in Kilungu sub-County within Makueni County, the Appellant intentionally caused his penis to penetrate the vagina of **EMK** a child aged 17 years.

2. There was an alternative charge of **committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the same day and at the same place, the Appellant intentionally touched the buttocks/breasts/anus/vagina of **EMK** a child aged 17 years.

3. After a full trial, the learned trial magistrate convicted him on the main charge and sentenced him to 15 years' imprisonment.

4. Aggrieved by that decision, the Appellant filed a petition of appeal and listed 5 grounds as follows;

a) That, the learned Magistrate erred in law in convicting the Appellant under a defective charge sheet.

b) That the learned Magistrate erred in law in sentencing the Appellant under a defective charge sheet without following the provisions of the law and thus the legality of the sentence is questionable.

c) That, the learned Magistrate erred in law in convicting the Appellant on the basis of insufficient evidence that had not proved the elements of the offence of defilement.

d) That, the learned Magistrate erred in law and fact in failing to hold that the Appellant had not been linked directly to the offence.

e) That, the learned Magistrate erred in law and fact in failing to consider the Appellant's defense.

5. Directions were given that the appeal be canvassed through written submissions and the parties complied. The Appellant was represented by learned counsel Mr. Mbullo and the Respondent was represented by learned prosecution counsel Mrs. Owenga.

6. A summary of the proceedings before the trial court is that **PW1 EM** was on 09/12/2017(*material day*), sent by her mother to buy cabbages at the home of Mailu. On her way back, she met the Appellant who forcefully grabbed and dropped her down. He removed her clothes by force, lowered his trouser and inserted his penis in her. She saw blood from her genitals. She went home but never told anyone about the ordeal. It was only later that she informed her mother. She was taken to Kilungu hospital and confirmed to be pregnant. She identified her treatment notes and P3 form (EXB1 and 2).

7. On cross examination, she said that the child in her belly belonged to the Appellant and agreed that they were classmates. She denied ever being asked into a relationship by the Appellant. She reiterated that the Appellant removed her clothes and inserted his penis in her genitals. She said that the Appellant was wearing a red trouser.

8. **PW2 MWM** is PW1's mother. She recalled that in February 2018, her daughter who had finished class 8 was yet to go to school. The assistant chief called and demanded that the child be taken to school. She paid the school fees and took PW1 to school where she was informed about PW1's pregnancy by the deputy principal. PW1 told her that the Appellant was responsible and narrated what had transpired. She recorded a statement with the police and took PW1 to hospital. PW2 called the Appellant who was non-committal about his role.

9. **PW3 Eric Kasiamani**, the clinical officer, testified that PW1 was 18 years at the time of filling the P3 form. She complained that on 09/12/2017, a person known to her had defiled and impregnated her. On examination, he found that her hymen was broken; she was 7 months pregnant and had contracted a venereal disease. He treated her and advised her to start the clinics. He formed the opinion that she had been defiled as she was 17 years old at the time of the incident. He produced the treatment notes and P3 form as exhibits 1 and 2 respectively. On cross-examination, he agreed that he did not examine the Appellant.

10. **PW4 P.C Susan Ruto** of Kilome police station, recalled being at the station on 17/07/2018 when the sub-chief of Musalala, Cecilia Waithera arrived with PW1, PW2 and the Appellant came and reported a case of defilement. She booked it and placed the Appellant in the cells. She took PW1 to the hospital where the pregnancy was revealed. PW1 was 17 years old at the time of the offence. On cross examination, she said that she did not visit the scene as the Appellant had been taken to the station by the sub-chief.

11. The Appellant who gave sworn evidence and testified as DW1 was a resident of Kithia and a casual laborer. He recalled 09/12/2017 but said he could not state anything about the case, since he was at work PW2 called him out but he did not go to her home that night. PW2 returned the following day and enquired whether he was aware of PW1's pregnancy. He went to PW2's home that night where PW1 insisted that he should marry her. He asked to think about the marriage but was summoned by the sub-chief to his home after two days and there he found PW1 and PW2. He was then forced to take responsibility for the pregnancy.

The Appellant's submissions

12. On defectiveness of the charge sheet, the Appellant submits that he was convicted under section 8(4) of the Sexual Offences Act (*the Act*) yet he had been charged under sections 8(1) and 8(3). He contends that failure to amend the charge sheet before the close of the prosecution's case rendered it incurably defective. He submits that even section 186 of the Criminal Procedure Code (CPC) could not salvage the situation as the child must be below 14 years for the section to apply.

13. On sufficiency of the evidence, he submits that the evidence on PW1's age was speculative and insufficient to warrant a conviction. He argues that PW1 did not testify about her age and that according to her mother, PW1 turned 18 years in February 2018 and was born on 23/05/2000. He contends that if PW1 was 18 years in February, 2018 then she couldn't have been born on 23/05/2000. He also frowns upon PW3's evidence that PW1 was 18 years old at the time of filling the P3 form yet the record does not show when the P3 form was filled. It's also his submission that PW3's evidence on age had no basis as there was no birth notification, birth certificate or immunization card presented to him or court.

14. The Appellant also submits that the trial court relied on section 124 of the Evidence Act to convict him without recording the reasons for believing PW1 as mandated by the Law. He contends that without the reasons, he is gravely hampered in challenging the trial court's belief.

15. He also submits that his defence was dismissed as a mere denial yet he had clearly stated from the start that he did not defile PW1. That he honestly went to the complainant's house and still denied responsibility for the pregnancy. That he gave sworn evidence which was not challenged on cross examination. He contends that there was miscarriage of justice for failing to give him the benefit of doubt.

The Respondent's submissions

16. The Respondent submits that in order to secure a conviction, the prosecution was supposed to prove; whether the Appellant penetrated the complainant, whether the Appellant was positively identified and whether the complainant's age was proved. The Respondent contends that the Appellant's counsel did not raise any issue with penetration and identification and as such, it should be taken that the two ingredients have been conceded.

17. On whether the charge sheet was defective, the Respondent submits that the age of 17 years indicated in the charge sheet did not correspond with section 8(3) of the Act and the trial magistrate used his wisdom to correct the error by citing the correct section *to wit*, section 8(4). According to the Respondent, the defect was curable under section 382 of the CPC.

18. On sufficiency of the evidence, the Respondent submits that the complainant's mother understated the age by four months at the time of trial but contends that the Appellant did not cross examine PW1, PW2 and PW3 on the issue despite having the chance to do so.

19. With regard to the magistrate's reliance on section 124 of the Evidence Act, the Respondent contends that the Appellant has not addressed this court on any untruths told by the complainant during trial.

20. In respect to the Appellant's defence, the Respondent submits that no proof was tabled to show that the Appellant was at work on that day. Further that the Appellant did not account for himself on the day the offence happened. It contends that the defence was an afterthought and mere diversionary tactic.

Analysis and Determination

21. This is a first appeal and it is now settled that the duty of a first appellate court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses. See **Okeno –v- R 1972 E.A 32; Simiyu & Another (2005) I KLR 192.**

22. Having considered the grounds of appeal, record of appeal and the rival submissions, it is my considered view that the following issues arise for determination;

a) *Whether the complainant's age was proved to the required standard.*

b) *Whether the charge sheet was defective.*

c) *Whether the offence was proved beyond reasonable doubt.*

Issue no. (a) whether the complainant's age was proved to the required standard.

23. The importance of age in defilement cases cannot be overstated as it determines, firstly, whether the complainant was a minor at the time of the commission of the offence and secondly, the kind of sentence to be meted out upon conviction.

24. According to the complainant's mother, the complainant had just turned 18 years in February 2018. It was also her evidence that the complainant was born on 23/05/2000 and that would translate to 17 years, 7 months at the time of the offence. By saying that the complainant had just turned 18 years, I would want to believe it is the quick mathematics that people do without giving too much thought to the exact birth date so that; 2018 minus 2000 automatically gives 18 years. The position in criminal law however is that there is no room for speculation as that is in itself a connotation of doubt. It should either be black or white with no grey area whatsoever.

25. I have also considered the Court of Appeal authority, **Richard Wahome Chege –vs- Republic [2014] eKLR**, which the learned trial magistrate relied on for the proposition that age is not proved primarily by production of a birth certificate. That case, in my view, is distinguishable in that there was consistency from all the witnesses who testified about age and the totality of the evidence irresistibly led to the conclusion that the victim was a minor. In our case however, the source of contradiction was the mother, the one person who would be considered as holding the best evidence with regard to age. It is also noteworthy that age assessment was never conducted on PW1. The Respondent relied on the case of **Evans Wamalwa Simiyu –vs- R 2016 eKLR**. In that case the evidence was clear that the minor was 12 years old while in this one it is not clear.

26. Further, I have also looked at the treatments notes and P3 form and both of them show that PW1 was examined on 17/07/2018, the same day that the Appellant was arrested. Contrary to the Appellant's submissions, I found no issue with PW3 testifying that PW1 was already 18 years at the time of filling the P3 form. The form is dated 27/07/2018 and if the birth date given by the mother is anything to go by, then PW1 was 18 years, 2 months at the time of examination. PW1 said nothing about her age. Be that as it may, my view is that failure to conduct age assessment and the contradiction from the mother blurred PW1's age and failed to prove that critical ingredient.

Issue no. (b) whether the charge sheet was defective

27. Once the offence is proved to the required standard, I find that no prejudice would be occasioned by convicting under the section that captures the properly established age of a victim. I agree with the prosecution that such an error is curable under section 382 of the CPC which provides that;

“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 at an earlier stage in the proceeding.

Issue (c) whether the offence was proved beyond reasonable doubt

28. It is clear that a charge of defilement cannot be sustained where the complainant's age has not been established. In addition to that, PW3's evidence was that PW1 was 7 months pregnant at the time of examination and this essentially means that conception occurred sometimes in January 2018.

29. Now, if PW1's child was fathered by the Appellant, then conception should have happened in December 2017, when the defilement is said to have taken place. Looking at this scenario in light of the fact that a DNA test was not conducted, I am convinced that the Appellant's concern about paternity is not idle. Doubts about paternity bring doubts about penetration which is also a critical ingredient of the offence of defilement. I am also at a loss on why it took so long for the report to be made. PW1 was allegedly defiled in December 2017, the mother found out in February 2018 and the Appellant was arrested and charged in July 2018. The Investigation officer (PW4) said the report of defilement was only made on 17/07/2018. What was happening in between?

30. PW1's evidence itself cannot stand alone. This is a girl who was aged about 18 years. She testifies that she met the Appellant as she came from Mailu's home. He grabbed her and removed her clothes including her panty by force. She never screamed, nor told anyone. Its nowhere stated where the scene was. Was it on the road, bush or someone's house. There is even no indication on what the time was. This leaves a lot to be desired and it is not for the court to fill the gaps.

31. Upon evaluating the evidence and considering the law applicable, I find that the offence of defilement was not proved to the required standard of beyond reasonable doubt.

32. The upshot is that the appeal has merit and it is allowed. The conviction is quashed and sentence set aside. The appellant to be set free forthwith unless lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 28th day of November, 2019, in open Court at Makueni.

.....

Hon. H. I. Ong'udi

Judge