



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 141 OF 2018

JOSEPH MULWA MUTHUSI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrates Court

at Kithimani delivered on 28.8.2018 by the Resident Magistrate E.W. Wambugu

in Kithimani PMCC Criminal Case SO.8 of 2017)

JUDGEMENT

1. This is an appeal from the conviction and sentence of **Hon. E. W. Wambugi RM**, in Criminal Case SOA No. 8 of 2017 delivered on 28.8.2018. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006. 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. He pleaded not guilty to both charges.

2. The appeal was lodged on 23.10.2018, which is more than 14 days after delivery of judgement in the trial court. However pursuant to leave granted on 10.12.2018 the same is deemed to be properly on record. The appellant's case is three-fold. Firstly that the conviction was based on insufficient and contradictory evidence. Secondly that the conviction was based on a defective charge sheet; Thirdly that the court did not consider the appellant's defence.

3. The appellant submitted that he was convicted on circumstantial evidence and that the prosecution's case was not proven beyond reasonable doubt.

4. The state opposed the appeal vide submissions filed on 24.7.2019. Learned counsel addressed four points; that is whether the prosecution proved their case beyond reasonable doubt, whether the appellant's right to fair trial was violated; whether the prosecution's case was marred with contradictions and whether the trial court considered the defence of the appellant. On the issue of proof of the prosecution case, learned counsel submitted that Pw1's evidence on age was corroborated by Pw4 and Pw5; that penetration was proven vide Pw2's evidence. On identification of the appellant, the evidence was that the appellant was well known to the victim since 2013. On the issue of contradictions, counsel submitted that the same are minor and curable under Section 382 of the Criminal Procedure Code Act. On the issue of consideration of the defence, counsel agreed with the findings of the trial court that the defence of the appellant could not exonerate him from the offence. On the issue of fair trial, counsel submitted that the appellant did not raise the same before the trial court and in any event the bringing of the appellant to court after 24 hours had no bearing on the innocence or guilt of the appellant. To that end, counsel submitted that the court should dismiss the appeal and uphold conviction and sentence of the trial court.

5. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. **PW1** was AN. No voir dire was conducted on her and the record does not indicate that the court was satisfied that she did understand the nature of an oath. However she did testify on oath. She told the court that she is a 14 year old resident in Muli farm with her father and uncle and a student at [Particulars Withheld] in Standard 6. She told the court that she knew the appellant who is a neighbour and that on 25.12.2016 at 7.00 pm the appellant invited her to a discussion on love and they agreed. She told the court that on 12.2.2017 she went to the appellant's house and they had sex because she had agreed to be his girlfriend and later she was taken to Kayole Police station to explain what had happened. She tendered in court the treatment notes, the clinic card, the P3 form and the PRC form. On cross-examination, she testified that the appellant did not force her.

6. **PW2** was Edwin Mutembei, a clinical officer from Masinga Health Centre. He told the court that he had an out-patient card from Ndela Dispensary in respect of AN, 13 years old who had been seen on 13.2.2017 at the clinic with a history of having eloped with a 30 year old

man. The out-patient card was used to fill the P3 form and it was tendered in court. He had the outpatient card from Masinga sub-county hospital dated 15.2.2017 in respect of PW1 whom he examined and he also filled in the P3 form on 15.2.2017 having established that Pw1 had a broken hymen. He told the court that he filled in the PRC form on 15.2.2017 and produced the same in court. It was his testimony that he examined the appellant who was established to be 19 years old.

7. **PW3** was Cpl Chaveth Lokoyo the investigating officer in the instant matter. He told the court that he knew the appellant and that on 12.2.2017, Pw1 aged 13 years, a student of [Particulars Withheld] Primary and her father came to the police station and reported that the appellant waylaid Pw1 and took her to his house and had sex with her without her consent and Pw1's mother was alerted by Pw1's screams and found the appellant with Pw1.

8. **Pw4** was JW who told the court that Pw1 is his step daughter and that on 12.2.2017 he was alone at home and that Pw1 came later and informed him that she had spent the night at the appellant's home hence he reported the matter to Kayole police post. It was his testimony that Pw1 informed him that she had sex with the appellant and that the appellant had the habit of getting her after school and having sexual intercourse with her.

9. **Pw5 VK** told the court that Pw1 is her child who was born in 2002 and produced the clinic card in respect of Pw1.

10. The court was satisfied that a prima facie case had been established against the appellant who was placed on his defence. Section 211 Criminal Procedure Code was explained to him and he opted to give unsworn evidence. He told court that he worked in a quarry and that on 13.2.2017 he was arrested. He denied the charges and added that the charges emanated from a grudge that he had with Pw4. The court found that the age of Pw1 was proven vide the health card and that at the time of commission of the offence, Pw1 was 14 years old; that penetration was proven vide medical evidence on the PRC form, P3 form and the account of Pw2; that the appellant was properly identified as a neighbour and in placing reliance on the case of **Martin Nyongesa Wanyonyi v R (2015) eKLR** that cited Section 143 of the Evidence Act found that the prosecution proved its case against the appellant and he was convicted of defilement and sentenced to 20 years imprisonment.

11. Having looked at the Appellant's and State's Written Submissions, the grounds of appeal and the evidence on the court record, the following are the issues for determination:-

a. **Whether or not the Prosecution had proved its case beyond reasonable doubt.**

b. **What orders the court may issue.**

12. On the issue of proof of the prosecution's case, the Appellant submitted that the prosecution did not prove its case; that the prosecution evidence was riddled with inconsistency and his defence was not considered. The prosecution opposed the appeal and submitted that they had proved its case. A perusal of the list of exhibits produced before the trial court showed a birth notification in the names of **AN** as the victim born on 18.12.2002, a P3 form as evidence of penetration in the names of **Pw1**. There is no eye witness account of the incident save for the account of Pw1 who gave her evidence in the absence of a voir dire examination.

13. The appellant has neither disputed nor admitted that he was at the scene on the material day. However he is reportedly a neighbor of the victim and the identity of the victim has been proven. There is evidence of a victim aged below 18 years. The appellant denied commission of the offence and he has imputed that he was framed. The trial court relied on the P3 and PRC forms to establish that there was penetration and the same are indicative that the complainant's hymen was absent.

14. It is trite law that in cases of defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

a) *That the victim was below 18 years of age.*

b) *That a sexual act was performed on the victim.*

c) *That it is the appellant who performed the sexual act on the victim.*

15. 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 **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**).

16. The prosecution had the burden of proving the case against the appellant beyond reasonable doubt. The burden does not shift to the appellant who is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See **Ssekitoleko v Uganda [1967] EA 531**). By his plea of not guilty, the appellant put in issue each and every essential ingredient of the offence of defilement for which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the appellant, at its best creates a mere fanciful possibility but not any probability that the appellant is innocent, (see **Miller v. Minister of Pensions [1947] 2 ALL ER 372**).

17. The evidence as narrated by Pw2, 3 and 4 is largely hearsay. The direct evidence is the account of Pw1 as corroborated by Pw2 who examined her and tendered in court the P3 form, the PRC form and the treatment notes that the appellant has not objected to or controverted. In this regard I find that there is no doubt as to the identity and age of the victim and the element of penetration.

18. Section 143 of the Evidence Act provides that: “**Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact.**” (emphasis added). A conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable. From the evidence on record, I am satisfied that the victim was telling the truth, because she told the court that she and the appellant were budding lovers and even confessed the same to Pw4. However the court is not able to solely rely on her evidence alone hence the need for corroborative evidence. The trial court did not satisfy itself of the danger of a conviction based on evidence of a single witness and further the trial magistrate was expected to indicate that the witness was telling the truth as per the provisions of section 124 of the Evidence Act. The Proviso to Section 124 of the Evidence Act is that “**Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.**”

19. With regard to the identity of the appellant, there is circumstantial evidence in addition to the account of Pw1 that is available. However before drawing the inference of the appellant’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 **Simon Musoke v. R [1958] EA 715; Teper v. R [1952] AC 480 and Onyango v. Uganda [1967] EA 328 at page 331**).

20. The circumstantial evidence that is available is that the appellant is the neighbour of the victim; he also has given no explanation for his movements on the material day and this was used to pin him down. The circumstances are suggestive that there was a meeting between the appellant and Pw1 that gave an opportunity for sexual contact and penetration, between the sexual organs of the appellant and the victim; the evidence of Pw4 that Pw1 was absent that night as well as her account that she had sex with the appellant is corroborative evidence that cast no doubt in the prosecution’s case. The appellant’s evidence is of no use for there was no other explanation given by him with regard to the charges facing him save that he was framed.

21. I am cognizant of the fact that the absence of a hymen cannot in itself prove penile penetration but having considered the evidence on record the same has left no doubt in the minds of a reasonable and prudent person with respect to the elements of penetration and the involvement of the appellant in the offence charged and a real possibility that the unlawful sexual act did indeed take place.

22. In the premises, I am unable to agree that there was inconsistency in the evidence of the prosecution. It was safe to convict on the basis of the evidence as presented by the prosecution in the instant case. I am not able to see how the trial was unfairly conducted because the appellant pleaded not guilty to the offences, he attended trial, was given an opportunity to cross examine all the witnesses and he was put on his defence. His attack on the manner that the trial was conducted lacks merit and is dismissed.

23. The appellant had not raised the defence of alibi but has however assailed the trial magistrate for failing to consider it. I am in this regard unable to agree that the defence was not considered since the same was duly considered as confirmed in the judgement of the trial magistrate.

24. In addressing the question as to whether or not the prosecution proved its case to the required standard, being proof beyond reasonable doubt, I find that the evidence on record is satisfactory to convince this court that the offence was committed by the appellant.

25. On the issue of the orders that the court may grant, because this court agrees with the conviction and sentence that was meted upon the Appellant by the trial court, I direct that appellant should continue to serve his sentence in accordance with the law since the sentence of twenty years is the minimum possible in law as per section 8(3) of the Sexual Offences Act. However the sentence shall commence from the date of arrest namely 13.2.2017.

0.326. In the result and save only to the extent that the sentence imposed shall commence from the date of arrest (13.2.2017) the appeal lacks merit and is dismissed.

It is so ordered.

Dated and delivered at Machakos this 27th day of November, 2019.

D. K. Kemei

Judge