REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 37 OF 2018

BARAKA MWARO MAINGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Criminal Case No. 623 of 2015 as presided over by Hon. L. N. Juma (SPM) at Kilifi Law Courts dated 18th May 2018)

CORAM: Hon. Justice R. Nyakundi

Mr. Kenga for the appellant

Ms. Sombo for the State

JUDGMENT

This is an appeal against conviction and sentence passed against the appellant by the Senior Resident Magistrate **Hon. L. N. Juma** in her Judgment dated on 18.5.2018, for the offence of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act.

The brief particulars of the offence were that on the 16.10.2015 in Malanga Sub-location, within Kilifi County, the appellant willfully and intentionally touched the genital organ, namely the vagina of GFK a child age thirteen (13) years old with his genital organ, namely, his penis.

The grounds of appeal as crafted by Learned Counsel **Mr. Kenga** on behalf of the appellant:

> ***1. That the Learned Magistrate erred in Law and fact by making a finding that the case was proved against the appellant beyond reasonable doubt.***
>
> ***2. That the Learned Magistrate erred in Law and fact finding penetration proved without medical evidence and without evidence of an eye witness but on sheer oral evidence of the complainant.***
>
> ***3. That the Learned Magistrate erred in Law and fact by finding penetration to have been proved despite the lack of evidence of existence of any medical evidence to prove penetration.***
>
> ***4. That the Learned Magistrate erred in Law and fact by acquitting the appellant of offence of defilement and convicting him on the offence of indecent act with a child yet purportedly found penetration proved.***
>
> ***5. That the Learned Magistrate erred in Law and fact by convicting the appellant based on her own assessment of age on the strength of her being a children Magistrate and thereby acting as a doctor in the matter.***
>
> ***6. That the Learned Magistrate erred in Law and fact by summarily dismissing the defence tendered by the appellant and instead believing the prosecution witnesses which had a lot of material contradictions.***
>
> ***7. That the Learned Magistrate erred in Law and fact by convicting the appellant on circumstantial evidence despite the existence of sufficient exculpatory evidence.***

Evidence in brief

The evidence by the complainant **(PW1) GF** was to the effect that on 16.10.2015 on or about 8pm she was by her sister **BF** with another girl by the name **(F)** to go to the home of the appellant to pick some unidentified article. It was also in her evidence that a motor cycle rider dropped her at the house of the appellant but left soon thereafter. The salient features of (PW1) testimony was that the appellant immediately defiled her inside the house without using any protection. According to the complainant the sexual act continued the whole night and was unable to scream because a piece of cloth used by the appellant covered her mouth.

The other strand of the complainant evidence was that upon leaving the appellant's house, she informed her sister **(B)** but cautioned her not to report the incident. The complainant therefore waited for the other sister in this proceedings referred to as **(P)** to convey her ordeal with the appellant. That is how the matter became a police case.

On cross examination, the complainant told the court that it was her sister (B) who called for the motor cycle to drop her at appellant's house. The complainant gave evidence that she was never told the exact item to be picked from the appellant's house.

Further, the complainant testified that she left the appellants home at about 4.00 A.M only to arrive at 7.00 A.M. On explaining the events of the night to her sister, it was the complainant's evidence that she never showed any concern.

The next witness called by the prosecution was **PFK (PW2)** a sister to the complainant. According to PW2, on returning from work at Mombasa she was informed by (PW1) that the appellant had defiled her. She therefore took steps to escort the complainant to Bamba Dispensary for a medical examination. From the initial treatment a P3 Form was filled at Kilifi Hospital detailing the nature of injuries suffered by the complainant with the evidence of the two witnesses. The appellant was placed on his defence in the witness box, the appellant gave a sworn statement in which he denied the offence of defilement and acts of indecent assault against the complainant.

The appellant further testified that while in his house the complainant came knocking that she had been sent by her sister (B) without even stating the exact item to be collected from his house. The appellant therefore dragged her out of the compound towards the road and that is the last time he saw the complainant.

On appeal, Learned counsel for the appellant submitted on salient points based on the grounds of appeal. It was his contention that the Learned trial Magistrate having found the offence of defilement not satisfactorily proved had no evidence to sustain the alternative charge of indecent act.

Counsel for the appellant wasted no time to point to this court that the evidence bearing on the case was of a single witness pertaining to the incident.

According to the counsel, it would have been necessary for the Learned trial Magistrate to analyze the evidence of the complainant to determine whether she was truthful given peculiar circumstances on how she ended up in the appellant's house.

That by the trial court coming up with other possible reasons that an indecent Act was committed by the appellant without accurate testimony from the complainant argued counsel rendered the trial unfair.

Learned counsel further submitted that the Learned trial Magistrate detailed account drawn from the complainant testimony was at variance with the elements of indecent act contrary to Section (11) (1) of the Sexual Offences Act. That the conclusion reached by the Learned trial Magistrate was baseless in view of the findings made on the main charge of defilement.

As submitted by Learned counsel, it is true that the trial Magistrate correctly found that the prosecution had not proved by evidence the age of the complainant at the time of the alleged defilement. That on the record the Learned trial Magistrate went further to point out that as along standing judicial practioner, the complainant age might have been not more than fifteen (15) years when the sexual act was committed.

In buttressing the grounds of appeal with well settled principles on the various aspects of this appeal, Learned counsel cited the following authorities: **Mark Oiruri Mose v R CR Appeal No. 295 of 2012, John Kariuki Waititu v R HCRA No. 58 A of 2015, John Irungu v R CR Appeal No. 20 of 2016.**

In a nutshell Learned counsel submitted that as a matter of Law the Learned trial Magistrate misdirected herself in overlooking the burden of proof in criminal cases and in determining the issues not supported with any evidential material on the part of the prosecution.

The Learned prosecution counsel submitted and supports the Judgment of the trial court. She argued and submitted that the Learned trial Magistrate considered all the facts and the circumstances of the case and came to the right conclusion appropriate to the case.

Learned prosecution counsel for the respondent referred the court to Section 124 of the Evidence Act in regard to the testimony of the complainant whose testimony was never shaken at the trial. To this general provisions, Learned counsel submitted that though age was not proved, but indeed the Learned trial Magistrate made specific observations from her experience to conclude that the complainant was a minor of not more than fifteen (15) years.

In Learned prosecution counsel contention whereas the substantive charge was not adequately proved, the overall criminality of the appellant was described by the evidence that he committed an indecent act. Further, Learned prosecution counsel submitted that it was necessary where there is clear evidence to convict the appellant of the alternative charge.

According to Learned prosecution counsel, it was proper in the circumstances of this case and it would seem to have been the only course open to the trial court to bring home the guilt of the appellant in the series of his sexual acts.

The other matter Learned prosecution counsel submitted on was on the inconsistencies and contradictions of the prosecution witnesses. Having viewed the evidence, Learned prosecution counsel brought the attention of this court the decision in **Twehangane Alfred v Uganda CR Appeal No. 139 of 2001,** for the proposition that if there were any inconsistencies in the evidence it was not fatal to their case against the appellant.

As the Learned prosecution counsel opposed the appeal reliance was placed on the following authorities **Tumaini Maasai v R MSA CR Appeal No. 364 of 2010, Dennis Kinyua Njeru v R** adopted the passage in **Francis Omuroni v Uganda CR Appeal No. 2 of 2000.**

Thus, Learned prosecution counsel argued and submitted that the questions which arose in this appeal lacks merit, favourable to the appellant.

Analysis and determination

This is a first appeal as laid down in **Okeno v R {1972} EA 32,**

> ***"the appellate court is obliged to analyze and re-evaluate the evidence adduced before the trial court, and independently draw its own conclusions, of course without overlooking the findings of the trial court should bear in mind that unlike the trial court, it did not have the opportunity of hearing and seeking witnesses testify."***

On the evidence of the complainant (PW1) and her sister (who testified as PW2) the trial court convicted the appellant for the offence of indecent act contrary to Section 11(1) of the Sexual Offences Act, and sentenced him to ten (10) years imprisonment.

Before conviction of the appellant on the alternative charge, the Learned trial Magistrate made a finding that she could not convict on the main charge of defilement for reason that age of the complainant was not proved beyond reasonable doubt.

This is an appeal I have had some difficult to appreciate the manner in which the proceedings were conducted by the Learned trial Magistrate.

From the facts set out above, the complainant was apparently sent by her sister (B) to go to the house of the appellant to pick an unknown item. The sister as stated in court by the complainant was known to the appellant. Also in the testimony of the complainant a motor cycle rider picked her from their home and dropped her in the house of the appellant. The complainant never showed up at their home soon after leaving for the appellant's house until 7.00 A.M. the following day.

The issue of Law pertinent to this appeal in my Judgment was the failure by the Learned trial Magistrate to call for evidence from sister (B) and the motor cycle rider who in the complainant's own testimony dropped her at appellant's house.

In the well known case of **Bukenya &others v Uganda {1972} EA 549** the court addressed this issue as follows:

> ***"(i). The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***(ii). That the court has a right and the duty to call witnesses whose evidence appears essential to the just decision of the case.***
>
> ***(ii). Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."***

In the instant appeal at the close of the prosecution case in support of the charge the evidence of the complainant prominently referred to her sister (B), a girl by the name (J) and motor cycle rider. The complainant and her witness (PW2) claimed that she was initially treated at Bamba dispensary and later a P3 form filled at Kilifi Hospital.

For reasons which were never explained their evidence did not form part of the prosecution cumulative evidence against the appellant. It is evident that the Learned trial Magistrate never made any attempts under Section 150 of the Criminal Procedure Code to summon the mentioned witnesses for examination as to their knowledge to the averments in the complainant statement on oath.

> **I am alive to the legal principle by virtue of Section 143 of the Evidence Act that no particular number of witnesses shall in absence of any provisions of the Law to the contrary be required for proof of any fact.**

However, I find it puzzling that the complainant would have had such a lengthy romantic acquaintance with the appellant on the 30.8.2013 without her sister (B) getting concerned for the delay in returning back home. If anything the complainant allegedly told the court that she went out of the house because of being sent by her sister (B) to the home of the appellant to pick some item or unidentifiable article.

I am in difficult to understand why the Learned trial Magistrate proceeded to close the prosecution case, especially in view of her observations on the medical evidence and non-proof of the age of the complainant.

From the assessment of the record it was within the discretion of the Learned trial Magistrate to summon the aforementioned witnesses, including the guardian/or parent to the complainant to testify as to the exact age, a critical element of the charge facing the appellant.

The unexplained failure by the prosecution and the trial Magistrate countenance of the default in appropriate circumstances of this case impacted on the quality of the evidence to proof facts in issue as provided for under Section 107 (1) of the Evidence Act.

There was no evidence that the key witnesses who featured in the complainant's statement could not be procured without undue delay or expense to the state.

It is undoubtedly clear that the failure to call these witnesses is sufficient to draw an adverse inference to interfere with the conviction of the appellant.

Secondly, it is plain from the proceedings that the trial court does not bear in mind the essential ingredients of the charge preferred against the appellant. The essential element of indecent act is defined under Section 2 of the Sexual Offences Act to mean an unlawful and intentional act which causes any contact between any part of the body of a person with the genital organ, breasts, or buttocks of the victim but does not include an act that causes penetration.

Further in Section 11(2) of the Act it provides:

> ***"It is a defence to a charge under this Section if it is proved that such a child deceived the accused person into believing that such a child was over the age of eighteen years at the time of the alleged commission of the offence."***

In the instant appeal, it is on record that the Learned trial Magistrate considered the matter and in her view found that age of the complainant was not proved beyond reasonable doubt. The alleged incident if it occurred one could not conclusively hold that the complainant was a female below the age of eighteen years contrary to Section 8 (3) and (11) (1) of the Sexual Offences Act. It was not possible to state the exact age of the complainant, before convicting the appellant on the alternative charge. It was inconceivable on the Learned trial Magistrate to make a finding as to the age of the complainant. In my view she descended to the arena of the trial to invoke wrongly Section 119 of the Evidence Act.

The case raises an important question as to the test to be applied when assessing the evidence, having regard to the provisions on the essential elements to the substantive charge, and when such evidence is manifestly discredited it can reasonably warrant a conviction for the alternative charge.

In my view, there was no evidence that went far enough in establishing a link against the appellant on indecent act but failed to connect him with the main charge of defilement.

To my mind at the close of the prosecution case, there was no cogent evidence that an independent and impartial tribunal could safely convict on it on the strength of the observations referred to elsewhere in this Judgment.

The complainant throughout her testimony both in examination in chief and cross examination makes no reference to indecent acts but used such words as ***"Baraka defiled me three times."*** Therefore, in describing the act of penetration, one should not mistake it with indecent act. There is a difference between penetrating the genital organ and the indecent acts as defined in Section 2 of the Act. Notwithstanding, this indication the Learned trial Magistrate went ahead to convict the appellant for an offence he was not alleged to have committed. In determining the differentia between the offence of committing defilement and acts of indecency as set out in the Law that is a correlation on the element of penetration of the genitalia and part of the elements in the alternative charge to be proved on indecent acts. In my view, both sexual acts as practically applied often lead to confusion. The position is not so simple for the simple reason that genitalia penetration of a female minor and touching the breasts, buttocks, or genitals are all acts of indecency.

It is for this reason that a charge sheet with requisite particulars like in the present appeal pauses a danger of violating fair trial rights under Article 50 of the Constitution. As a whole the question is did the appellant penetrate the vagina of the victim or the particular act was that of indecency? The only reasonable interpretation I take of this appeal is in the manner and context of the principle in the case of **Johnson v Miller {1937} 59 CLR 467 where Dixon J held**:

> ***"A defendant is entitled to be appraised not only of the legal nature of the offence with which he is charged; but also of the particular act, matter or thing alleged as the foundation of the charge."***

Therefore, the criterion on which a decision can be reached is whether the act complained of was an act of penetration contrary to Section 8 (1) of the Sexual Offences Act or indecent Act under Section 11(1) of the three aforesaid Act. In this case the evidence set out in specific detail was that if penetration and not indecency act.

This was an erroneous assessment of the complainant's evidence that somewhat deprived the appellant a fair trial.

As regards the issue of recognition or identification of the appellant, I place reliance on the guidelines laid down in **R v Turnbull {1976} 63CR Appeal 132, Abdullahi Bin Wendo v R 20 EACA 166 and Anjononi & Others v R {1976} – 80 IKLR 1566.** I am fully conscious that this may have been a case of recognition other than identification of the appellant.

The question is whether on the face of the complainant's evidence she was telling the truth, considering the reasons and adverse inference drawn from the key important witnesses not called by the prosecution. This court is not sure if the complainant evidence was cogent and truthful that she spent the whole night at the appellant's house. It is also important to note that the Law requires the Learned trial Magistrate to caution and warn herself in placing reliance to the correctness and reliability of the single identifying witness on identification or recognition.

The Learned trial Magistrate in this case never cautioned or warned herself as to this specific legal direction.

I echo the principle in the case of **Abasi Kiboso v Uganda {1965} EALR 507** where the court held interalia:

> ***"That the trial Judge placed far greater reliance on the evidence of the complainant that was undesirable, in view of the lacuna in her evidence."***

In the present appeal there are unanswered questions as to why the complainant did not pick the alleged item using the motor cycle rider she used to travel to the appellant's house? Whether indeed, as stated in court she had actually been sent to the appellant's house by the sister as alleged. In the same vein whether in visiting the appellant's house, whatever item or article meant to be collected from the appellant was delivered to the sister. Why she decided to leave the motor cycle rider depart from the house knowing very well that it was during the night. This shows that the complainant sequence of events, amount to unanswered questions to impeach her credibility.

Therefore, to be tainted with inconsistencies and contradictions. All these matters go to the quality of the evidence of a single identifying witness as to who actually participated in the indecent act.

I have considered carefully the evidence in this appeal in relation to the grounds of appeal as advanced by legal counsel for the appellant. The evidence upon which the appellant's conviction was founded in my view was not watertight but one on shaky and unreliable testimony of the complainant.

In the result, this appeal discloses an error of Law and fact on the part of the trial court. It must succeed in favour of the appellant and is accordingly allowed. The Judgment of the trial court is hereby set aside by quashing the conviction and sentence. The appellant is at liberty unless otherwise lawfully held.

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

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R. NYAKUNDI

JUDGE

In the presence of:

1. Ms. Sombo for the DPP

2. The appellant