REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 132 OF 2018

JACKLYNE SYOMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Principal Magistrates Court at Mavoko vide judgement delivered on 23.11.18 by the Senior Principal Magistrate C.C. Oluoch in Mavoko Sexual Offence Case 7 of 2018)

JUDGEMENT

1. This is an appeal from the judgement, conviction and sentence of Hon. C.C Oluoch, Senior Principal Magistrate in **Criminal Case SO. 7 of 2018** delivered on 23.11.2018. The Appellant was charged with the offence of sexual assault contrary to Section 5(1)(a)(ii)(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge was that the appellant on divers dates between 15th January, 2018 and 10th March, 2018 within Machakos county intentionally and unlawfully inserted her fingers into the vagina of **JFP** a child aged 3 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 prosecution presented five witnesses so as to establish the guilt of the appellant while the appellant presented four witnesses in defence. Pw1 was RN, the mother of Pw2 who testified that the child was born on 22.11.2014 as indicated in her birth certificate in the names of JFP. It was her testimony that on 10.3.2018 Pw2 informed her that the appellant usually "lies on her". She told the court that on 12.3.2018 Pw2 informed her that the appellant did tabia mbaya on her and that the doctor at Aga Khan Hospital examined the minor and informed her that Pw2's hymen was broken. She testified that she took Pw2 to Nairobi Women's Hospital and that the minor informed the doctor that the appellant usually inserted her finger in the minor's vagina. Pw1 recalled that at times within the time that the appellant came to work for her, she noted that when she washed Pw2 she noted that the child complained of pain in her vagina and noted that it had a hole and yet it had previously been intact. Pw1 produced in court the P3 form, PRC form and the treatment notes in respect of the minor from Aga Khan Hospital. On cross examination, she told the court that she noted that the child's vagina was open but thought it was growth and that the child identified the appellant as the one who inserted her hands into her vagina.

3. Pw2 was **JFP**. A voir dire was conducted upon her and the court was not satisfied that she was competent to testify on oath and was allowed to give an unsworn statement. She testified that she was in the house alone with the appellant who inserted her fingers in her vagina and who gave her "tamu". She told the court that she informed her mother about it. On cross examination, she was able to identify the appellant as the one who inserted her fingers in her" poopoo".

4. **Pw3** was **Irene Makau**, a doctor at Nairobi Women's Hospital with a diploma in Clinical Medicine. She told the court that the child was examined by Joy Mwendwa and that she was familiar with her handwriting hence the PRC form was produced under Section 33 of the Evidence Act. It was her testimony that the child was called JFP who was examined on 13.3.2018 and her mother suspected that the appellant had been inserting her fingers in the child's private parts and that the PRC form confirmed that the hymen was broken and recorded that the child was sexually assaulted. She testified that the P3 form was filled by Joy Mwendwa and that the entries made were in consonance with the PRC form and noted that the child's hymen was broken and sphincter muscles were loose. She confirmed that the child was examined at Aga Khan Hospital. She tendered the PRC and P3 form in the names of JFP. On cross examination, she told the court that the child was brought to the hospital on 13.8.2018 and that the appellant stayed with the child for 1 ½ years and that the child had a history of fingers being inserted in her genital organs. She testified that the child had physical injuries and that a child of three years should have an intact hymen. She told the court that the child was in pain and the age of the injury was hours as per the P3 form.

5. **Pw4** was **No. 91686 Pc Jane Muthoni** of Mlolongo Police Station, Gender office. It was her testimony that on 14.3.2018 she received a report from Pw1 that Pw2 was molested by a house-girl and that the child was taken to Aga Khan Hospital and later to Nairobi Women's Hospital and a P3 form was filled. She told the court that Pw2 informed her that the appellant inserted her fingers in her vagina and that she was led to the appellant's house where she arrested her. It was her testimony that she was given a copy of the birth certificate indicating that the child was three years old. On cross examination, she told the court that the child's account of the incident was consistent hence she could not have framed the appellant.

6. **Pw5** was **Dr. Lydia Kemunto** from Aga khan Hospital who told the court that she examined the child called JFP on 12.3.2018 and noted the absence of a hymen. On cross examination, she told the court that a child of four years should have an intact hymen.

7. The court found that a prima facie case had been made against the appellant who opted to give a sworn statement and called three witnesses. She testified that she was working for Pw1 as a house-girl from 15.1.2018 till 9.3.2018 when she was fired and on 25.3.2018 she saw police officers who arrested her for inserting her fingers in the vagina of the child. She told the court that the child could have been confusing her for a boy called D. On cross examination, she told the court that she would be left alone with the child in the house and would feed her. She told the court that the child was truthful and was not in the habit of telling lies but was coached by her mother on what to say in court.

8. Dw2 was Risper Muringo who told the court that she was with the appellant when she was arrested.

9. Dw3 was Johnstone Muia, the appellant's brother who told the court that he received information from the appellant that she had been arrested.

10. Dw4 was Francis Misie, the appellant's father who told the court that he did not know why the appellant was arrested but that Pw1 had called him requesting for a house-girl.

11. The court found that penetration was proven vide the account of Pw2 as narrated to Pw1 and Pw3 as corroborated by medical evidence. On identification of the appellant, reliance was placed on Section 124 of the Evidence Act and the court was satisfied with the evidence of Pw2. The court found that the prosecution proved its case and the appellant was convicted of sexual assault and no findings were made on the alternative charge. She was sentenced to 10 years imprisonment.

12. The appeal was canvassed vide written submissions. It is the appellant's case that the trial court went into error in failing to appreciate that the victim and her witness did not meet the standards of Section 125(1) of the Evidence Act and Section 19(1) of the Oaths and Statutory Declarations Act. Further counsel for the appellant submitted that the prosecution evidence was marred with contradictions and added that the charge sheet was defective for the wrong provisions of the law were cited. On the sentence, no submissions was made. Counsel urged the court to allow the appeal

13. The state submitted that penetration was established by the account of Pw2 as well as the clinical officer who in confirming broken hymen concluded that there was sexual assault. With regard to the identification of the appellant learned counsel submitted that the evidence of the complainant together with Pw1 positively identified the appellant as the person employed as the house-girl who took care of Pw2. On the issue of the defective charge sheet, learned counsel submitted that section 134 of the Criminal Procedure Code spells out the contents of a good charge sheet. Similarly section 382 of the Criminal Procedure Code states that the test to be met is whether injustice has been occasioned. The counsel added that the defect ought to have been raised earlier but that the error was inadvertent. On the issue of inconsistencies, counsel submitted that the discrepancy in time of commission of the offence be disregarded because the discrepancies are curable under Section 382 of the Criminal Procedure Code. The state submitted that the appeal be dismissed and the court uphold the conviction and sentence of the trial court.

14. This being a 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.

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

> ***1. That the trial Magistrate erred in law by convicting the Appellant for the offence of sexual assault 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 court failed to consider the defence of the appellant.***

16. Having considered this appeal and the rival submissions, the issues for determination are whether the prosecution proved its case; whether the charge sheet was defective and whether the trial court failed to consider the appellant's defence.

17. The appellant's counsel has pointed out that the charge as drawn was defective, in that it stated the offence was contrary to section 5(1)(a)(i)2) of the Sexual Offences Act. I agree with the learned counsel and add that it is imperative for officers in the criminal justice system to read the charge before signing it to confirm that it is properly drafted. The Sexual Offences Act indicated the need to include the word 'as read with' in respect of such charges. Although to err is human, a majority of the charge sheets in respect of sexual offences have this challenge. The fact that this defect may be cured ought not to be an excuse for poor drafting especially now that the prosecution counsel are lawyers. The court too, has a duty to exercise due diligence to ensure that an accused person is not embarrassed or prejudiced. I find that the charge sheet was defective but no prejudice was occasioned to the appellant and the defect could not vitiate the trial and conviction of the appellant who fully participated in trial and was aware of the charges she faced. The appellant participated in the trial from start to finish and equally presented her defence leaving no doubt that she understood the charges she faced. I find the defect is curable under section 382 of the Criminal Procedure Code as the appellant suffered no prejudice.

18. With regard to the issue of proof of the prosecution's case Section 5 of the Sexual Offences Act provides for the offence of Sexual assault;

(1) Any person who unlawfully—

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

19. The prosecution was required to prove penetration of the complainant's genitalia by the body part of the appellant.

20. From the evidence on record it is undisputed that there was penetration. What needs to be reanalyzed is the evidence with regard to the identification of the appellant.

21. The evidence on record points towards penetration and this was indicated on the P3 form, the PRC form and the account of the victim.

22. P3 form was filled by Dr. Joy Mwendwa on 19.3.2018. Pw3 testified on the physical examination carried out on the victim and testified on the contents of the P3 and PRC form that was filled on 13.3.2018. The Appellant did not object to its production. Dr. Joy concluded that the victim was sexually assaulted and signed the P3 form.

23. The P3 form indicates that, "*the hymen was not intact.* To convict the appellant, there ought to have been no doubt in the mind of the court that the appellant was responsible as well as rule out other causes or explanations to the condition of the body of the complainant. **Maraga and Rawal, JJA**, as they then were), in **P. K.W v REPUBLIC [2012] eKLR** took this view.

24. The trial court took into account the medical evidence in totality and not in isolation of other factors surrounding the case.

25. The victim testified that the appellant was a person known to her and thus she recognized her. The evidence of Pw1 and Pw2 placed the appellant at the scene of the crime and so was her own evidence.

26. The appellant denied sexually assaulting the victim and gave no explanation to the charges facing her and from the evidence on record there is no plausible explanation or defence or evidence to controvert the evidence laid against her.

27. From the foregoing, I did not have the benefit of seeing the witnesses testify. However from the proceedings and the court record, the trial court was satisfied of the evidence against the appellant. The learned trial magistrate rightly relied on the evidence of Pw1, though she did not indicate the provisions of Section 124 of the Evidence Act as expounded in the case of **Mohamed v R (2006) 2 KLR 138**. **Section 124 of the Evidence Act** provides:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

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."

28. The appellant's counsel seemed to assail the trial court for failing to warn itself of the need to accept the uncorroborated evidence of the victim. Historically courts were as a matter of practice required to warn themselves of "the danger" of acting on the uncorroborated evidence of a complainant in a sexual assault case. If no such warning was given, the conviction would normally be set aside unless the appellate court was satisfied that there had been no failure of justice. Such was the cautionary rule in sexual offences.

29. In East Africa the leading authority on this rule has been the decision of the East African Court of Appeal in **Chila and Another vs. R [1967] EA 722** and courts have followed Chila to overturn convictions by lower courts.

30. The origin of the rule was expressed by Lord Justice Salmon in **R vs. Henry & Manning (1969) 53 Crim. App Rep 150, 153** that: "in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these cases girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate, and sometimes for no reason at all."

31. I am nevertheless alive to the fact that courts in the region and beyond have posited that the rule has neither scientific nor logical basis. (See the South African case of **S v Jackson 1998 (1) SACR 470 (SCA)** and Section 32 (1) of the U.K Criminal Justice and Public Order Act,

1994 which abolished the cautionary rule on similar grounds. The rule is also seemingly discriminatory against women considering that they form the majority of victims of sexual assault.

32. I note that the appellant gave unsworn testimony and the trial court did not fully address the legal requirement for corroboration in such instances.

33. One would think, the trial court ought to have expressly recorded:

I. That there is corroboration

II. That it is well aware of the danger of convicting in such circumstances and

III. That despite the defect it is nevertheless satisfied beyond reasonable doubt that complainant is telling the truth.

34. With regard to corroboration, the available evidence was medical evidence and circumstantial evidence. The medical evidence presented the undisputed fact that there was penetration. The circumstantial evidence pointed towards the fact that the appellant had the opportunity to assault Pw2 as she was severally left in the company of the minor. This court is aware of the danger of conviction on the unsworn testimony however has considered what Wigmore points out, "infinite degrees in this character we call credibility". (Wigmore on Evidence vol. III para 2034 at 262.)

35. I have no doubt that Pw2 was truthful and the appellant pointed this fact out. Pw2's evidence was cogent and consistent and pointed towards the appellant as responsible for penetration that caused the absence of her hymen. Similarly the prosecution evidence of Pw1, Pw3 and Pw2 is consistent and all point towards the identity of the appellant as the perpetrator. The learned magistrate considered the surrounding circumstances that the appellant was well known to the victim and relied on Section 124 of the Evidence Act. I agree with the evidence on record that the appellant was identified as the perpetrator.

36. The appellant has raised the issue of failure to consider her defence but she has however raised no defence. She gave no explanation for her activities on the material day so as to enable the court infer no guilt on her part. She sort of raised an alibi which did not create any doubt on the prosecution's evidence as she confirmed having been with the minor on the material date and further confirmed that the minor was always truthful in what she said. Having stayed with the minor for that long she had become accustomed to her and there was thus no possibility for the minor to frame her. In any case it was highly unlikely that the mother of the victim would use her vulnerable daughter as a victim of sexual assault with a view to framing the appellant for any perceived differences. It is noted that no grudges were established to have existed between the complainant's mother and the appellant.

37. From the evidence on record the conviction for the offence of sexual assault was safe and the sentence as provided within Section 5(1) (b) of the Sexual Offences Act is within the law.

38. In the result, I find that the appeal lacks merit and is dismissed. The conviction and sentence is upheld.

It is so ordered.

Dated and delivered at Machakos this 18th day of December, 2019.

D. K. Kemei

Judge