REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 88 OF 2017

TITUS MUUO KATIWA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(*Being an appeal from the conviction and sentence of the Chief Magistrates Court at Machakos vide judgement delivered on 6.7.2017 by the Senior Resident Magistrate I.M. Kahuya in Machakos CMCC SO.1733 of 2014***)**

JUDGEMENT

1. This is an appeal from the conviction and sentence of **Hon. I.M. Kahuya SRM, in Criminal Case SOA No. 1733 of 2014** delivered on 6.7.2017. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the appellant on diverse dates between August 2013 and March 2014 at [particulars withheld] Village, Kitanga Location within Machakos County intentionally caused his penis to penetrate the vagina of **EM** a child aged 7 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. He pleaded not guilty to both charges. He was convicted on the main count and sentenced to life imprisonment.

2. The appeal was lodged on 14.7.2017, which is within 14 days after delivery of judgement by the trial court. The appellant's case is two-fold. Firstly that the conviction was based on insufficient hearsay evidence. Secondly that that the sentence was excessive.

3. Learned counsel for the appellant submitted that the prosecution evidence was based on hearsay and that no due consideration was given to the appellant's defence. Further that the minimum sentence was excessive and unconstitutional. Reliance was placed on the cases of **Francis Karioko Muruatetu & Another v R (2017) eKLR; Sammy Musembi Mbugua & 4 others v Attorney General & another [2019] eKLR.**

4. The state conceded to the appeal vide submissions dated 4.11.2019. Learned counsel submitted that the evidence on penetration was shaky since the incident was reported by the complainant six months after the occurrence and this raised doubt as to whether the incident happened.

5. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. **PW1** was BKN who told the court that on 8.9.14 he received a call that the victim had been defiled. He presented a birth certificate indicating that the child was aged eight years. He told the court that the appellant was a neighbor and that he went to Machakos on 20.9.14 where he interrogated the victim who informed him that the appellant had defiled her. He told the court that he took the victim to Nairobi Women's Hospital where she was examined. On cross examination, he told the court that he was informed about the incident on 18.9.14 and that the appellant had been his employee but had left employment.

6. **PW2** was **JKM** who testified that on 18.9.2014 Pw3 informed her that the appellant had defiled her.

7. **Pw3** was **EMK** who told the court that in 2013 the appellant defiled her. On cross examination, she told the court that she reported the matter in 2014.

8. **Pw4** was **EM** who told the court that Pw3 informed her that on 18.9.2014 the appellant defiled her. She testified that the matter was reported to the police on 28.10.2014 and that the appellant was arrested.

9. **Pw5** was **Dr. John Mutunga** from Machakos Level 5 Hospital. He told the court that he had a p3 form in respect of EMK who was alleged to have been defiled in March, 2014 and who was examined seven months after the offence. He told the court that he filled the P3 form on 30.10.2014 and produced the same. He told the court that he had the PRC form that indicated that the hymen was absent and there were no bruises found on the victim's genitalia.

10. **PW6** was **Pc Wambugu** the investigating officer in the instant matter. He told the court that on 28.10.2013 he received a report of

defilement and he issued a P3 form and on conclusion of investigation he arrested the appellant. On cross examination, he told the court that he was concerned about the length of time that the report took to be made.

11. 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 the appellant and he opted to give sworn evidence. He told the court that he was working for the victim's mother in 2013 and left in August 2013 and returned to Kathome in November 2013. However in February 2014 he was fired then on 1.11.2014 he was arrested. He denied commission of the offence.

12. The court found that the age of Pw1 was proven vide the birth certificate and that at the time of commission of the offence, the victim was seven years; that penetration was proven vide medical evidence that indicated a missing hymen and the account of Pw2; the issue that the appellant was properly identified was not addressed. However the magistrate relied on Section 124 of the evidence Act and found that the prosecution proved its case against the appellant and who was convicted of defilement and sentenced to life imprisonment. She disregarded the defence of the appellant that there had been a grudge.

13. 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.**

14. On the issue of proof of the prosecution case, the Appellant submitted that the prosecution did not prove its case; that the prosecution evidence was hearsay and that the appellant's defence was not considered. The Respondent conceded to the appeal and submitted that the prosecution failed to prove penetration and that the delay in reporting the incident was suspicious. A perusal of the list of exhibits produced before the trial court showed a birth certificate in the names of **EM** as the victim born on 23.8.2006, a P3 form as evidence of penetration in the names of **EMK** and a PRC form in the names of EK. There is no eye witness account of the incident save for the account of the victim who gave her account.

15. The appellant has neither disputed nor admitted that he was at the scene on the material day. The appellant denied commission of the offence and he has imputed that he was framed. The trial court relied on the P3 and PRC form to prove that there was penetration and the same are indicative that the victim's hymen was absent.

16. 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 accused who performed the sexual act on the victim.

17. 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's 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 which he had been charged and the prosecution had 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 accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see **Miller v. Minister of Pensions [1947] 2 ALL ER 372**).

18. The evidence of the age of the victim is undisputed and so is penetration. However the court has to satisfy itself on the issue of identity of the appellant. The occurrence of the incident as narrated by Pw1, 2, 4, 5 and 6 is largely hearsay. The direct evidence is the account of Pw3 and the court ought to have satisfied itself on the danger of relying on a single witness and this was lacking in the judgement of the trial court. 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. From the evidence on record, I am not satisfied that the victim was telling the truth because she reported an incident that occurred in 2013 in the year 2014. This court is not quick to disregard her evidence if there was corroborative evidence.

20. The prosecution seemed to rely on circumstantial evidence to pin the appellant. In a case placing reliance on circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused'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**).

21. The circumstantial evidence that is available is that the appellant was the neighbour of the victim. The would be corroborative evidence on record casts doubt on the prosecution's case despite the fact that there was no other explanation given by him with regard to the charges facing him save that there was a grudge.

22. For this court to make a finding of fact based on the available evidence, this court must be satisfied that there are no other co-existing circumstances which would weaken or destroy the inference. I find that the testimony of Pw3 could not be corroborated by that of Pw5. The medical evidence proves penetration but however there is nothing to prove that sexual intercourse as defined by section 2 of The Sexual Offences Act occurred between the appellant and Pw3. The circumstances do not establish that there was a meeting between the appellant and Pw3 that gave an opportunity for sexual contact and penetration, between the sexual organs of the appellant and the victim. I am aware that the absence of a hymen cannot in itself prove penile penetration but having considered the evidence on record the same has cast 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 not even take place.

23. In the instant case, I am satisfied that there is no direct or cogent circumstantial evidence pointing irresistibly to or showing that it is the appellant that caused the victim the absent hymen and it was not safe to convict on the basis of the evidence as presented in the instant case.

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 unsatisfactory to convince this court that the offence was committed by the appellant. It transpired from the evidence tendered that the complaint was reported much too late. Indeed the mother of the complainant admitted that she took about seven days to take the minor to hospital and then took another one month to report to the police. In all the incident is alleged to have been made known after a period of six months. Under those circumstances it was unsafe to convict the appellant on uncorroborated evidence. Again the trial magistrate failed to comply with the provisions of section 124 of the Evidence Act. The appellant claimed that there was a grudge and one cannot rule it out because he was arrested several months after he had been fired from employment and this casts doubt on the prosecution’s case. I am satisfied that the evidence presented did not meet the threshold of proof beyond reasonable doubt against the appellant. Mr. Machogu learned counsel for the Respondent rightly conceded to the appeal.

25. In the result I find the appellant’s appeal has merit. The same is allowed. The conviction is quashed and the sentence set aside. The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

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

D. K. Kemei

Judge