REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 21 OF 2017

(From the original conviction and sentence by Hon. N.M. Idgawa – R.M. at Nkubu law courts on 18th October, 2016.)

SAMMY MURIU.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

[1] The Appellant Sammy Muriu was charged with the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that between 19th and 20th May 2013, (particulars withheld) he intentionally caused his penis to penetrate the vagina of M.K a child aged 15 years. In the Alternative the Appellant faced a charge of committing an Indecent Act with a child contrary to section 6 (2) of the same Act (though there is no such section) The Appellant was tried and at the end was convicted of the main charge of defilement and sentenced to 20 years imprisonment.

[2] Being dissatisfied with the said conviction and sentence, the Appellant filed this appeal on 10th February 2017. He subsequently filed Amended Grounds of Appeal setting out the following grounds of appeal

> ***(a) The Learned Trial Magistrate erred in both law and facts by failing to consider that the evidence tendered by PW1, the complainant in this instant matter amounts to blatant lies.***
>
> ***(b) That, the learned trial magistrate erred in both law and facts when he acted on paradoxical testimonies tendered by the prosecution witnesses to convict the appellant.***
>
> ***(c) That, the learned trial magistrate erred in both law and facts by failing to note that the evidence adduced by pw3, the clinical officer did not prove that there was any forceful penetration of the complainant's genitalia.***
>
> ***(d) That the learned trial magistrate erred in law and fact by failing to note that the vital witnesses were not availed to the court during the trial to give their testimonies regarding this instant matter.***
>
> ***(e) That the trial magistrate erred in both law and fact by failing to observe that the appellant was neither medically examined nor was a D.N.A test conducted upon him to ascertain whether he was the proprietor of this ordeal.***
>
> ***(f) That the appellant's defence was rejected without giving cogent reasons and yet it was***

comprehensively on how he did not commit the alleged ordeal with a guilt mind since he was deceived by the complainant that she was a grown up.

[3] When the Appeal came up for hearing on 21st September 2017, the Appellant urged the court to entirely rely on his written submissions. Briefly, the Appellant submitted that he did not commit this offence as alleged by the prosecution and that the case was fabricated by the prosecution witnesses. More specifically, he stated that the evidence by PW1 (the complainant) was blatant lies. It was further submitted that the evidence adduced by PW3 the clinical officer who examined the victim did not suggest that there was any forceful penetration of the complainant's gentalia and that no D.N.A was tendered to support this allegation.

[4] Mr. Namiti for the State in opposing the appeal submitted that all the ingredients of the offence of defilement namely; age and penetration were proved beyond reasonable doubt and that the identification of the accused person was proved beyond reasonable doubt as PW1 had stated in her evidence that she met the accused on 19th May 2013 at 6 PM and that she knew the accused as people called him Sammy and that this was period long enough to enable the complainant positively identify and recognize the accused as the perpetrator.

[5] This being 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. See KIILU & ANOTHER vs. REPUBLIC [2005]1 KLR 174where the Court of Appeal stated thus;

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

In doing so, I am aware that there is no any particular prescribed method of re-assessing evidence. Nonetheless, mere rehashing of the evidence as was recorded will not pass for a good style. Of great significance, therefore, is for the appellate court to employ a style imbued with judicious emphasis, an eye for symmetry or balance and an ear for subtleties of the evidence so as not to miss the grace and power of the testimony of witnesses and the law applicable thereto. Such style also insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. And ultimately, the court should, in absolute clarity and directness, make its overall impression of the evidence adduced after placing it upon the scales of the law. I shall so proceed.

[5] The prosecution witness set out to show that PW1 was defiled by the Appellant. The Appellant in his defence testified that his name was not Sammy Muriu and that the charges he was facing were a fabrication. He further denied having ever met the complainant on the day that she alleged to have been defiled. what does the evidence and the law say?

Analysis

[6] It has now been agreed that, in cases of defilement, the prosecution must prove three things, namely:

1. The age of the victim;

2. Penetration; and

3. That penetration was by the Appellant.

Age of victim

[7] Age of victim in defilement cases serves important purposes. First, the offence of defilement relates only to children. And, second, age of the victim determines the amount of punishment to be imposed. See Sexual Offences Act. In this case, the victim, PW1 told the court that she was born in 1998. She produced Child Health Card produced as PEXH3 which indicates that the victim herein was born on 14th November 1998. She also produced the General Out-Patient Records (PEH1) which also indicated that she was 15 years of age. Her mother, PW2 confirmed that the victim was born on 14th November 1998. Therefore, as at 20th May 2013 when the offence herein allegedly took place, the victim was aged 15 years. Accordingly she was a child for purposes of the Sexual Offences Act.

Penetration

[8] According to Section 2 (1) of the Sexual Offences Act, penetration;

> ***"…means the partial or complete insertion of the genital organs of a person into the genital organs of another person;"***

And, in accordance with Section 8 (1) of the Sexual Offence Act:

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

Was there penetration?

[9] I have carefully considered the evidence that was adduced before the trial court. PW1 gave a detailed account of the events of that day. She was categorical that the Appellant told her to remove her skirt, biker and pant but she refused. Then the Appellant removed them by force and made her lie on his bed. He then inserted his penis into her private parts and told her that he wants "kunikula". Her evidence remained unchallenged and unshaken even in cross examination where she stated;

> ***"……..yes you removed my clothes and inserted your thing inside."***

[10] PW 3 testified that upon examining the complainant who had allegedly been defiled, found the hymen to have been broken although there were no obvious injuries noted and that he examined her one day after the incident. I am aware of the contention raised by the Appellant that PW3's evidence (the clinical officer), did not suggest that there was any forceful penetration and that the trial court erred in not conducting a DNA test. PW3 testified that he examined PW1 1 day after the incident and that she had changed clothes. Medical evidence may have been lost as a result. But, penetration need not be proved only by way of medical evidence. Direct evidence by the victim is important. I should also state that, contrary to the submissions by the Appellant, it is not mandatory for DNA test to be conducted in sexual offences in order to prove penetration. The wording of section 36 of the Sexual Offences Act is not couched in mandatory terms and there is no express requirement of law that a DNA test must be conducted. In any event the evidence adduced by the prosecution in this case remained strong and consistent and there was no need to conduct a DNA. There was penetration in the sense of the law. For clarity, see Section 36 of the Sexual Offences Act which provides as follows:

Evidence of medical, forensic and scientific nature

> ***(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.***

Was penetration caused by the Appellant?

[11] The victim was categorical on the events of the day. She testified how she met the Appellant on the fateful day; that the Appellant told her that since it was dark, they should go and sleep at her sister's place; that she went with him but when the sister did not come, the Appellant told her that they should go to his house. upon reaching his home, he asked her to remove her skirt, biker and pant but she refused. Then, the Appellant removed them by force, made her to lie on his bed and inserted his penis into her genitalia. This evidence remained unchallenged and unshaken and it bears repeating that in cross examination she stated;

> ***"You told me we go to your sister's place……..yes you removed my clothes and inserted your thing inside."***

[12] Her evidence was corroborated by PW2 (her mother) who testified that she had sent her daughter to the shop but she did not return until the following day when she got information from a neighbor that she had been spotted near a hotel. Upon enquiring, the victim told her that she had slept at Sammy Muriu's house (the appellant) and that the said Sammy had removed her clothes and had sex with her. PW4 testified of a report of defilement having been made by PW1 and PW2 and that they later arrested the Appellant. The evidence of this prosecution witnesses remained cogent, credible, reliable and unshaken throughout the trial.

[13] The Appellant generally contended that the evidence given PW1 was blatant lies. The testimony of PW1 shows that the Appellant was not known to PW1 prior to this incident. PW2 similarly stated that she did not know the Appellant prior to this incident and that it was PW1 who led them to his house. All this evidence remained unchallenged throughout the trial and there is nothing on record which showed that PW1 and PW2 had any reason to falsely implicate the Appellant. It is also not in dispute that PW1 stayed with the Appellant from 19th May 2013 from around 5 PM to about 20th May 7:30 PM. This was considerable time with the Appellant. In the circumstances I do not find any possibility of mistaken indentify. I have come to this conclusion after I have thoroughly warned myself of the danger of convicting on the evidence of one identifying witness. Indeed PW2 and 4 corroborated PW1's evidence that it was indeed PW1 who took them to the Appellants house and this evidence remained unchallenged throughout the trial.

[14] The Appellant argued that his defence was rejected without giving cogent reasons. He also raised matters of mistaken identity of the perpetrator. The record shows that the trial magistrate in dismissing his defence tackled the issue of mistaken identity splendidly as follows:

> "***The accused in his defence stated that he was not Sammy Muriu but Samuel Mworia and these were the names on his ID card. Records from registrar of persons did not capture his identity this is a defence that accused brought out during defence stage he did not cross examine the prosecution witnesses on the name. I find it as an afterthought and dismiss it. All along the trial the accused has been responding to that name. all the witnesses referred to him by that name of most important when the complainant pinpointed the pedophile out it was the accused who was the one identified and he is the one who was arrested and arraigned in court for defiling the complainant. The accused was not known to the complainant and her mother prior to the incident and there is no bad blood between this witnesses and the accused to make them fabricate the charge against him."***

Conclusions

[15] The Appellant caused an act of penetration with PW1- a child of the age between 12 years and 15 years. He is therefore, guilty of the offence of defilement contrary to section 8(1) of the Sexual Offences Act. Accordingly, he was convicted. Again, given the age of the child, the appropriate sentence was meted out in accordance with section 8(3) of the Sexual Offences Act which provides as follows:-

> ***(3) A person who commits an offence of defilement with a child between the age of twelve and***

fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

I will however pose a hypothesis: whether following the thinking in the Supreme Court decision on mandatory death penalty, minimum sentences also impinges on court's discretion to mete out appropriate sentence. Food for thought.

[16] In the upshot, nothing turns on any of the grounds set out in the grounds of appeal. The entire appeal fails and is dismissed. It is so ordered.

Dated, signed and delivered in open court at Meru this 27th day of February 2018

F. GIKONYO

JUDGE

In the presence of:

Appellant in person

Mrs. Mwathi for State

F. GIKONYO

JUDGE