



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 51 OF 2016

BONFACE CHITSANGO NGOBA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the Original Conviction and Sentence in Criminal Case

No. 1116 of 2011 of the Senior Principal Magistrate's Court

at Kilifi – L.N. Wasige (Mrs.), SRM)

JUDGEMENT

1. The Appellant, Bonface Chitsango Ngoba is currently serving life imprisonment having been found guilty of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, 2006. The particulars of the charge being that on 8th November, 2011 at Kilifi Township in Kilifi County, the Appellant penetrated L.P.J, a child aged 7 ½ years.
2. The Appellant being aggrieved by both the conviction and sentence has appealed to this court on the grounds that his conviction was based on uncorroborated medical evidence; that there were discrepancies in the evidence of the prosecution witnesses; that the trial Magistrate failed to draw a negative inference from the failure to call the complainant's mother as a witness; that the trial Magistrate relied on extraneous matters in convicting him; and that the trial court erred in disregarding his defence.
3. This being a first appeal, this court has to review the evidence adduced in order to reach its own independent conclusion on the same. In so doing, the court should warn itself that, unlike the trial court, it did not have the opportunity of observing the demeanour of the witnesses as they testified.
4. In brief, the prosecution's case is that on the material day PW1 L.P.J. was at their home at [particulars withheld], Kilifi with her mother, her father (PW2 J K N) and her uncle (PW3 B M) when her uncle dispatched her to a shop about 20 metres away to get him change for Kshs.50. As the complainant was coming back from the shop she met the Appellant who asked her to go to his house. The complainant proceeded home and gave the change to her uncle. She then proceeded to the house of the Appellant which was about five metres from their house.
5. On entering the house of the Appellant, she found him alone. He asked her to get on the bed but she refused. The Appellant held her hands and pulled her to the bed whereupon he removed his kikoi and also removed her dress before defiling her. In the process, her father called her name loudly but the

Appellant covered her mouth so that she could not respond. Thereafter, the Appellant released her and she proceeded home.

6. When she reached home her parents asked her where she had been and she told them what had happened. Her father caned her and she told her mother what was done to her. Her father then took her to the house of the Appellant and confronted him but the Appellant denied defiling the complainant. The complainant was taken to Kilifi District Hospital for treatment and the matter reported at Kilifi Police Station. The Appellant was arrested and charged.

7. The questions to be answered in this appeal are whether the complainant was a child at the time of the alleged defilement and whether the Appellant penetrated the complainant's genital organ.

8. Replying to the Appellant's submissions, the Respondent stated that its case was proved beyond reasonable doubt. On the age of the complainant, the Respondent submitted that the trial Magistrate made a finding that the child was eight years old at the date of the offence thereby falling within the age bracket of eleven years as provided by Section 8(2) of the Sexual Offences Act. Further, that the variance in the age as stated in the charge sheet and the testimony adduced was not fatal to the Respondent's case, as such variance did not prejudice the Appellant.

9. The Appellant holds a different view on this issue. He submitted that the stated age of the complainant of 7½ years was never proved as the evidence adduced showed she was 8 years old at the time the offence was committed.

10. My finding on this issue is that the evidence adduced showed that the complainant was 8 years at the time of the alleged defilement. The contradiction between the age of the child as stated in the charge sheet and the evidence adduced did not in any way prejudice the Appellant. One of the ingredients that needed to be proved in respect to the offence with which the Appellant was charged was that the victim was eleven years or less. This ingredient was positively proved by the Respondent through the production of a birth certificate.

11. On the trial Court's findings on the evidence adduced, the Appellant asserted that the Court erred by finding that there was penetration. According to the Appellant the mere fact that the complainant's hymen was broken and there was reddening and inflammation of the genital organ was not of itself proof that there was penetration. According to the Appellant, the P3 form produced by PW5 Dr. Aziza Majid showed that the external genitalia of the complainant was normal but the vagina was red and inflamed. The Appellant submitted that no injuries were noted even though the complainant had testified that the alleged assault was her first sexual encounter. Further, that the complainant did not bleed even though this was her first sexual act.

12. The Appellant asserted that the medical officer who filled the P3 form did not make any remarks as to what may have caused the reddening and inflammation of the vagina and what may have broken the hymen.

13. The Appellant submitted that although the complainant was examined a day after the alleged defilement, the evidence adduced by PW5 was that the reddening and inflammation of the vagina and rapture of the hymen occurred days before the complainant was examined on 10th November, 2011 and not a day before the examination. It was therefore the Appellant's submission that there was no prove of penetration.

14. On the issue of whether the penetration, if any, was by the Appellant, the Appellant submitted that the conduct of the complainant immediately after the alleged incident and her physical state created doubt on the veracity of the allegation that she was defiled by him. According to him, the complainant did not immediately report the incident to her parents despite being caned. Further, that there was no evidence of trauma as concluded by the trial Court.

15. The Appellant submitted that PW2 and PW3 contradicted each other on what they saw on the material

day thereby creating credibility issues in so far as their evidence is concerned. The Appellant also asserted that the trial Court erred in concluding that the mother of the complainant was not a crucial witness in the case and that no unfavourable inference could be drawn from the prosecution's failure to avail her as a witness. The Appellant pointed out that the complainant reported the alleged defilement to her mother who in turn reported the same to her father (PW2). It is the Appellant's case that it was only the mother who could have examined the complainant's genitalia and made any observations.

16. On the trial Court's reliance on the proviso to Section 124 of the Evidence Act to convict him, the Appellant asserted that the trial Magistrate failed to give reasons in writing for believing that the complainant was telling the truth.

17. Finally, the Appellant accused the trial Court of failing to consider his defence simply stating that the same was a sham.

18. In response to the Appellant's submissions, the Respondent took the court through the judgement of the trial Court and pointed out that the Court had carefully considered the evidence adduced and reached the right decision.

19. From a distance, the Respondent's case appears tight and neat but a closer inspection would disclose some unfilled and unexplained gaps.

20. The complainant told the court that she met the Appellant as she was going to the shop to get change for her uncle (PW3). The Appellant told her to go to his house. After delivering the change to PW3 she went to the Appellant's house which was about five metres away. The Appellant told her to go to the bed but she refused. He, however, pulled her to the bed, removed his kikoi and her skirt and defiled her.

21. Cross-examined, the complainant told the Court that when her parents asked her where she was coming from, she told them she was coming from the Appellant's house. It is only after she was caned that she reported to her mother that the Appellant had defiled her. Her father and her uncle took her to the Appellant's house who denied defiling her. She was then taken to hospital.

22. The evidence of PW2 is that when she noticed that the complainant was missing, he asked her siblings to look for her. As they were still looking for her, he saw her emerge from the Appellant's house which was about three metres from their house. The complainant told him that she was coming from the Appellant's house but refused to tell him what she was doing there at that hour. He caned her but she did not say anything. He asked his wife to talk to her and it was then that the child told her that the Appellant had defiled her. He went to the Appellant's house with his wife but the Appellant denied defiling the child.

23. Upon cross-examination PW2 insisted that he saw his child emerge from the house of the Appellant at 9.15 p.m.

24. PW3 testified that after the complainant brought him change she went inside the house. The mother of the child later told him that she had gone missing for about 15 to 30 minutes. She later reported to him that the complainant had come from the house of the Appellant. He later heard the complainant report the defilement to her mother. Later, the father of the child confronted the Appellant with the allegation of defilement but he denied defiling the complainant. The Appellant also denied the allegation before the village elder, PW4 Salim Mwambire.

25. When PW3 was cross-examined he testified that:

“I was at my green grocer stall with my customers at 9.00 p.m. Jackson PW2 was not present. The victim was also not present. I knew Pendo was in her house. I do not know where (PW2) was. Jackson PW2 was absent. Jackson (PW2) was not present when the victim (PW1) told her mother about the defilement....

I witnessed PW1 being caned by her father. The victim gave the defilement allegations after she was caned by her father.”

26. In the evidence of PW3 lies the unraveling of the Respondent’s case. The evidence of PW3 is not clear as to whether the complainant confessed that she had been defiled prior or after the beating by PW2. He stated that PW2 was not present when the complainant told her mother about the defilement. At the same time he told the court that the complainant made the defilement allegation after she was beaten by PW2. Which part of his evidence is to be believed?

27. Of momentous note is the evidence by PW3 that PW2 was not present when the complainant arrived from the Appellant’s house. This clearly contradicted the evidence of PW2 who testified that he saw the child emerge from the house of the Appellant. PW3 told the court that he did not see the child emerge from the Appellant’s house. That made the evidence of the mother of the child crucial in this case. She was however not called to testify and neither was any explanation offered for not availing her as a witness.

28. In his evidence the Appellant told the court that the complainant and other children went and played outside his house but later went home at about 8.00 p.m. At around 8.30 p.m. on that same night PW2 went and accused him of having defiled the child but he denied doing so. When the Appellant was cross-examined he told the court that when the children left his house the complainant went to another neighbour’s house.

29. Turning back to the evidence adduced by the prosecution, I must state that the medical evidence was wanting. No treatment notes were produced. The medical officer who testified was not the one who filled the P3 form thus making the witness unhelpful.

30. The child told the court that the alleged defilement was a first sexual encounter. The P3 form talked of a missing hymen. The child was examined a day after the alleged defilement. Why was no injury seen? There is no mention of any spermatozoa being seen. Could the child have been defiled before the Appellant allegedly defiled her?

31. The Appellant accused the trial Court of failing to state the reasons for believing that the complainant told the truth. This accusation has no basis. The trial Magistrate considered the evidence of the complainant and gave reasons in her judgement as to why she found the child to be truthful. Whether her finding was correct is a different issue altogether.

32. There is, however, reason to question the trial Court’s finding that the child was telling the truth. The proviso to Section 124 of the Evidence Act which requires corroboration in criminal cases states 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.”

33. In order for the proviso to operate, certain ingredients are required:

- a) The crime committed should be a sexual offence;
- b) The evidence available is only that of the victim; and
- c) The trial court must record in the proceedings the reasons for concluding that the victim is telling the truth.

34. In the case at hand, there was corroborative evidence in the testimony of PW2, PW3 and the medical report. In order for the trial Court to conclude that the complainant was telling the truth, the corroborative evidence ought to have supported the evidence of the complainant. This was not the case as the

corroborative evidence was contradictory.

35. In the case at hand, I have pointed out the fundamental contradictions in the evidence of PW2 and PW3. It is also clear that the medical evidence adduced did not satisfactorily prove that the complainant was actually defiled.

36. In the circumstances of this case, the evidence of the Appellant seemed more plausible than that adduced against him. He ought to have benefited from the inconsistencies in the prosecution case.

37. I am therefore convinced that the case against the Appellant was not proved beyond reasonable doubt as required by the law. His appeal therefore succeeds. His conviction is quashed and the sentence set aside. He is henceforth set at liberty, unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 19th day of March, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT