



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO. 79 OF 2015**

**PAUL LUBWAYO BWIRE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against Conviction and Sentence imposed in Criminal Case Number 130 of 2014 in the Principal Magistrate's Court at Maseno delivered on 6.10.14 by Hon. M. C. Nyigei (RM))*

**JUDGEMENT**

**The Trial**

1. On 6<sup>th</sup> October, 2014; the Appellant was convicted for the Offence of defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006 and was sentenced to serve 20 years imprisonment.

**The Appeal**

2. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal. In the grounds of Appeal filed on 13<sup>th</sup> February, 2018, Appellant raised 5 grounds of Appeal **THAT**:

- 1. The Learned trial Magistrate miscarried justice by establishing the age of the Complainant using documents from different people***
- 2. The Learned trial Magistrate erred in Law and in relying on contradictory evidence of the Complainant and the clinical officer.***
- 3. The Learned trial Magistrate erred in Law and in fact in not calling for a DNA test.***
- 4. The Learned trial Magistrate erred in Law and in convicting the Appellant on the basis of evidence from a single witness.***
- 5. The Learned trial Magistrate failed to consider the Appellant's Defence that he was implicated by the Complainant***

3. When the Appeal came up for hearing on 13<sup>th</sup> February, 2018, Appellant indicated that he was relying wholly on the grounds of Appeal and Submissions filed on 13<sup>th</sup> February, 2018. Ms. Wafula, learned counsel for the state submitted that the prosecution case had been proved beyond reasonable doubt in that Complainant had identified the Complainant and medical examination revealed injuries and presence of spermatozoa in Complainant's vagina.

**Analysis**

4. This being a first Appeal, this Court has a duty to evaluate the evidence, analyse it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that (see ***Okeno v Republic [1972] EA 32***). This duty was aptly stated in the case of ***Isaac Ng'ang'a Kahiga v Republic [2006] eKLR*** where the Court of Appeal said:-

***“A Court hearing a first Appeal (i.e. a first Appellant Court), also has to carefully examine and analyse a fresh the evidence on record and come to its own conclusion on the same but always observing that the trial Court had the advantage of seeing the witnesses and observing their demeanor so the first Appellate Court would give allowance of the same.”***

### **The prosecution's case**

5. The prosecution called 5 witnesses in support of the charge. PW1 the Complainant stated that she was 14 years old and was in class 4. She recalled that Paul called her to his house where he defiled her after which he gave her 10/-. That she returned home and after reporting the matter to her mother, she was taken to hospital.

6. PW 2 M A, Complainant's mother told Court that Complainant was born in the year 2000 and was 14 years. She produced Complainant's baptism card which shows she was born on 11.1.2000 as **PEXH. 3**. She recalled that on 12.2.14, Complainant returned home looking frightened, and gave her 10/- which she said was given to her by one Paul. That upon inquiry, Complainant informed her that Paul had taken her to his bedroom and defiled her. That she reported the matter to police and escorted Complainant to hospital where she was treated and was issued with treatment notes and a P3 Form. She identified Appellant as Paul and stated that he was her neighbor.

7. PW 3 David Rai, a member of community policing recalled that he arrested the Appellant on 12th February, 2014 after it was reported that he had defiled Complainant.

8. PW 4 Maina Aggrey Ametsa, a clinical officer stated when he examined Complainant on 14<sup>th</sup> February, 2014 and found her with bruises on labia majora and labia minora, dead spermatozoa and viral cells as a result of which he concluded that the child had been defiled. He produced the P3 Form and treatment notes as **PEXH. 1 and PEXH. 2** respectively.

9. PW 5 CPL Lydia Migwi said she investigated the case after which the Appellant was charged. She tendered the Complainant's immunization card which shows that Complainant was born on 11.1.2000 as **PEXH. 3**.

### **The Defence Case**

10. When put on his defence, the Appellant gave sworn testimony denied the offence but conceded that Complainant and her families are his neighbors. The learned trial Magistrate considered the evidence and finding the charge proved against the Accused sentenced Appellant to 20 years imprisonment.

### **THE ISSUE FOR DETERMINATION BEFORE THE COURT**

11. The issue for determination before the Court is whether on the evidence presented before the Court, the charge of defilement Contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act 2006 No. 3 of 2006 had been proved.

In dealing with this Appeal, I will separately consider the grounds of Appeal as follows:-

#### **a. Complainant's age**

12. The penalty for various offences under the Sexual Offences Act, 2006, is determined by the age of the Complainant. The age of the victim is a matter of fact which can be proved by evidence other than birth certificate and age assessment report. In this case, both the immunization card and the baptism card were marked **PEXH. 3** and they show that Complainant was born on 11.1.2000.

13. I am satisfied that the evidence on record shows that the age of the Complainant was proved to be 14 years. The immunization card and the baptism card corroborate the evidence that Co

*“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial Judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi –vs- Duncan Mwangi Wambugu (1982 – 88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982 – 88) 1 KAR 870”*

### **Analysis and Determination**

14. I have perused the entire record of Appeal and considered the Submissions by counsels for both parties. In determining this Appeal, I will endeavour to address each of the grounds of Appeal separately as hereunder.

#### **1) Exhibits which were not produced**

##### **a. Order for extension of time**

15. The Court record and the list of exhibits evidently demonstrate that the order for extension of time to file suit out of time was neither pleaded, alluded to by the Respondent in his testimony nor produced in Court as an exhibit. While conceding that the order had been annexed to the record of Appeal, the Respondent's counsel failed to explain how it got into the Court file.

16. This Court after considering the evidence on record has come to the conclusion that the trial Magistrate's finding that the said order was in the Court file is not supported by the evidence on record and an inference is therefore made that the said order was mischievously sneaked into the Court record after the issue regarding extension of time was raised by the Appellant in his Submission before the trial Court.

**b. Sale Agreement**

17. In his testimony at page 108 of the record of Appeal, Respondent stated that his Advocate had received a Sale Agreement and copy of Appellant's ID Card to prove that he had bought the accident Motor Vehicle from Al Hyder. The said Agreement and copy of ID Card were marked for identification but they were not produced as exhibits.

18. From the foregoing, I am in agreement with the Respondent that the holding by the trial Court that the vehicle had been sold to the Appellant was mistaken since it was not supported by the evidence on record.

**2. Was the case proved on a balance of probability?**

19. Having found that Respondent did not establish that Appellant was either registered owner or beneficial owner of the accident motor vehicle, I find and hold that there was no nexus between the driver of the accident motor vehicle and the holding by the Court that Appellant was vicariously liable for the action of the said driver was therefore erroneous.

**3. Was the claim that was time-barred**

20. Even though I have found that the order for extension of time was mischievously sneaked into the Court record, there is no evidence that the said order is not authentic. I therefore find that leave to file suit out of time had been granted.

**4. Was the award excessive**

21. Although there is evidence that Dr. Okombo testified and produced his report, I have searched through the record and I can't find that report. The P3 form shows that Respondent suffered fracture of right humerus, loss of 3 front teeth and multiple soft tissue injuries to the legs, head, eye, nose and mouth. In his testimony, Dr. Okombo confirmed the fracture of the humerus which he said had healed with a deformity, multiple soft tissue injuries and broken incisor tooth, residual scars. There was no evidence of three missing teeth in Dr. Okombo's testimony.

22. It is the duty of Advocates to cite relevant authorities to guide the trial Court. Respondent did not file Submissions on quantum. The Appellant in his Submissions offered Kshs.350,000/- and relied on MKS HCCC NO. 359/1995 JANE MULI V JULIUS MUOKI & ANOR which did not show the injuries suffered by the Plaintiff and MKS HCCC NO. 192 OF 1997 JANE MUTHEU WAMBUA V ONESMUS WAMBUA MUTISO where Plaintiff was awarded Kshs.250,000/- for undisplaced fractures of pelvic area and lacerations on the left arm with insignificant scars.

23. The learned Trial Magistrate found that the injuries suffered by the Respondent were comparable to the injuries in the cited cases and awarded general damages in the sum of Kshs.1,100,000/-. With due respect, the learned trial Magistrate did not justify the award of Kshs.1,100,000/- if indeed the injuries in the cases cited by the Appellant were similar to the ones suffered by the Plaintiff.

24. In the case of NJUGUNA GIKONYO VERSUS KENYA TEA DEVELOPMENT AUTHORITY NBI HCCC 1533 OF 1992, the Plaintiff sustained fracture of the left humerus, injury to the neck, major injury to the back and soft tissue injuries to both legs and was awarded Kshs.300,000.00 as general damages.

25. In the case of STEPHEN NGINZA MBANDI VERSUS DISMAS K. KIATINE AND 2 OTHERS Nairobi HCCC No. 138 of 1987, Plaintiff suffered fracture of the left humerus. He was unconscious on admission to hospital. The fracture did not unite hence an operation for open reduction internal fixation and bone grafting was recommended at a cost of Kshs.40,000.00. He was awarded Kshs.200,000.00 as damages for pain suffering and loss of amenities.

26. In the case of BONIFACE WAITI & ELLEN WAITHERA V MICHAEL KARIUKI KAMAU [2007] eKLR, the 2<sup>nd</sup> Plaintiff was awarded Kshs.295,000/- for multiple injuries including fracture of humerus that had healed with an angulated deformity.

27. The context in which the compensation for the Respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past. (See Simon Taveta v Mercy Mutitu Njeru [2014] eKLR) The authorities cited above are old and considering the lapse of time, I find that an award of Kshs.500,000/- would have sufficed in this case.

**Decision**

28. From the foregoing analysis, I have come to the conclusion that the Respondent's case was not proved on a balance of probability and ought to have been dismissed. In the result the Appeal is allowed to the extent that the order in favor of the Respondent is set aside and substituted with an order dismissing the Respondent's case.

Appellant shall have costs of the Appeal and of proceedings in the lower Court.

**DATED AND DELIVERED ON THIS 12<sup>th</sup> DAY OF April 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open Court in the presence of**

**Court Assistants: Felix & Caroline**

**Appellant: N/A**

**For the Client: N/A**