



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 10 OF 2017

R B T.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the Judgment of Hon. L.N. Juma, RM, delivered on 24th July, 2017 in Kilifi Senior Principal Magistrate's Court Criminal Case No. 163 of 2014).

JUDGMENT

1. The appellant, R B T, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 28th day of March, 2014 within Kilifi County, intentionally and unlawfully caused his penis to penetrate in (sic) the vagina of MZL [name withheld] a child aged 17 years.
2. He was charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on 28th March, 2014 within Kilifi County intentionally touched the buttock, breast and vagina of MZL [name withheld] a child aged 17 years.
3. After a full hearing of the case, the Hon. Magistrate found the appellant guilty of the main charge of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2016 and sentenced him to serve 15 years imprisonment.
4. The appellant being aggrieved by the said conviction and sentence filed a petition of appeal on 10th May, 2017. On 18th December, 2017 he filed an application seeking leave to amend his grounds of appeal. The same were deemed by this court as being properly on record. They form the basis of his written submissions.
5. The appellant's amended grounds of appeal filed on 18th December, 2017 raise the following issues:-
 - (i) That the Learned Trial Magistrate erred in law and fact in basing his conviction and sentence on the charge sheet without considering that the same as drafted against him was in variance with the evidence, hence the charge was defective;
 - (ii) That the Learned Trial Magistrate erred in law and fact by not considering that he was a minor by the time of the offence, thus his rights as a child should have been taken into account;
 - (iii) That the Learned Trial Magistrate erred in law and fact in basing his conviction on the medical evidence adduced;
 - (iv) That the Learned Trial Magistrate erred in law and in fact in conducting a voire dire process on the victim who was not a minor of below 12 years of age and therefore acted contrary to the law;
 - (v) That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him without considering that the prosecution totally failed to prove its case beyond reasonable doubt; and
 - (vi) That the Learned Trial Magistrate erred in law and fact in not considering his sworn defence.
6. In expounding on the above amended grounds of appeal, the appellant relied on his written submissions filed on 18th December, 2017. On the defective charge, the appellant stated that there was a variance with regard to the age of the victim as reflected on the charge sheet and the evidence tendered in court. He stated that the charge sheet gave the age of the victim as 17 years but this was contradicted by the evidence of

PW3, a Doctor who said that the victim was 16 years old as she was born in July, 1999. The appellant further submitted that a Post Rape Care Form (PRC form) filled 3 days after the incident showed that the victim was 18 years. He stated that the foregoing indicates that the age of the victim was not well established. The appellant indicated that despite the contradictions he had pointed out, the prosecution failed to amend the charge to suit the requirements of the case.

7. The appellant contended that he was a child when he was charged with the case in the court below and asserted that his rights under the provisions of Sections 184 to 194 of the Children's Act and Article 53 of the Constitution, as read with Section 8(7) of the Sexual Offences Act No. 3 of 2006, were violated. He said that he was in the same class as the victim yet he was said to be older than her. He argued that the victim's age assessment was done on 6th June, 2014 which was exactly 2 months and 6 days from the date of the alleged offence. He therefore contended that she was 17 years and 10 months when the alleged offence occurred. He stated that the Hon. Magistrate failed to consider the provisions of Section 8(7) of the Sexual Offences Act when sentencing him.

8. On medical evidence the appellant submitted that proper medical results could not have been made on the victim as she bathed and washed her clothes before going to hospital. He further stated that no Doctor or Medical Officer was called from Chumani Health Centre to give evidence yet PW1 and PW2 stated that they first went for treatment at the said Health Centre.

9. The appellant also contended that the age of the injury on the victim was not given thus it was difficult to tell if perforation to the victim's hymen was old or recent. It was submitted that the Doctor did not state if there was penetration of the victim's genitalia. The appellant suggested that the victim's hymen could have been broken by riding a bicycle or it could have been contributed by other reasons. In his view, it was therefore possible that there was no defilement as PW3 did not give a conclusive finding on the same. The appellant also argued that he was not taken for DNA analysis to ascertain if he defiled the victim as alleged.

10. The appellant took issue with the fact that the victim was taken through voire dire examination, as in his view, the same is conducted on children of the age of 12 years and below, yet the victim herein was 17 years old.

11. The appellant also challenged his conviction based on the failure by the prosecution to produce medical notes of the victim, not calling one Rehema Kenga who was adversely mentioned by PW2, failing to call the Investigating Officer to testify, failing to produce the victim's birth certificate and by the prosecution's failure to call the medical expert who examined both the victim and himself for purposes of age assessment.

12. In concluding his submissions, the appellant stated that the Hon. Magistrate did not consider his sworn defence.

13. The respondent filed its written submissions on 17th January, 2018. These indicate that the complainant's (PW1's) evidence was unshaken in cross-examination as to the identity of the person who defiled her, whom she identified as the appellant herein, who was her brother-in-law. It was submitted that PW2 received a report that PW1 had been defiled and that the latter narrated to her what had happened. PW2 took PW1 to hospital for treatment. A P3 form was filled and age assessment done on PW1. She was found to be 17 years old. It was submitted that like PW1, PW2's evidence remained unshaken in cross-examination.

14. The respondent's submissions indicate that a Post Rape Care Form (PRC form) filled by Justine Chiro and a P3 form filled by Dr. Mitei were produced by Dr. Aziz Manji, PW3. It was stated that both documents indicate that PW1 had pain on her neck, bruises on her shoulder and her hymen was broken. It was submitted that according to PW4 who took over investigations from Sergeant Kagwiria who was transferred, the first report was made on 28th March, 2014 by PW1 in the company of her father. PW4 produced PW1's age assessment report.

15. On the defence tendered by the appellant, the respondent submitted that the appellant did not address the criminal case facing him and only stated that he was unemployed and his father passed away. In addition, it was submitted that the Hon. Magistrate found that the appellant was properly identified by PW1 and believed the evidence of PW1 that she was defiled by the appellant. The respondent cited the case of **Stephen Nguli Mulili vs Republic** [2014] eKLR where the court relied on a Diagnostic HIV Testing and Counseling Patient/Client card, General Outpatient Record and P3 form which gave the complainant's age as 13 years, as proof of the complainant's age.

THE EVIDENCE

16. PW1, MZL [name withheld] was taken through voire dire examination by the Hon. Magistrate. It was found that she understood the importance of telling the truth and gave sworn evidence. She informed the court that her place of residence is Roka. She adduced evidence that on 28th March, 2014 at 6:00 a.m., she put water in the bathroom as she was preparing to go to school. She went to look for firewood when she saw R (appellant) whom she asked where her book was, which she had given him. He asked her to accompany him to collect the book. She recounted that the appellant pushed her inside the house when she refused to get in. It was her evidence that the appellant pushed her down and held her throat and defiled her. Although she screamed, no one went to assist her as people were still sleeping.

17. PW1 further testified that when the appellant left her, she went home and told her mother, who called PW1's sister. They went to Chumani where PW1 was treated. She reported the matter at Kilifi Police Station on the same day. She was told to go to hospital, where she went for treatment and was examined by a Doctor. She stated that she was injured on the neck, back and other parts. She gave evidence that a P3 form was filled which she identified in court as MFI-1 and a Post Rape Care Report form which she identified as MFI -2. She stated that the appellant is her brother-in-law as his sister is married to her brother.

18. On cross-examination, PW1 asserted that the appellant defiled her but there was no witness around. She reported to her parents when she went home. She stated that the appellant went to PW1's home later and on being asked by PW1's mother what he had done to PW1, the appellant said "mama nisamehe" (forgive me mother). He then ran away. She stated that after she was defiled, she went home in pain.

19. PW2, ES [name withheld], who is PW1's sister testified that on 28th March, 2014 she was called and told that her sister, PW1, had been raped (sic). She went to their home at Roka and found her mother and PW1. The latter who was seated on the bed started crying and narrated to her the facts of the defilement. She was told that PW1 had been washed. Her clothes were soaked in water which was red (sic).

20. PW2 testified that she took PW1 to Chumani Medical (sic) but was referred to Kilifi District Hospital where they went to, but were told to go the following day as it was in the evening. Come the next day, a P3 form was filled. PW2 stated that PW1 was 17 years old. She had the age assessment report for PW1 which was marked as MFI-3.

21. PW2 further stated that PW1 was in [particulars withheld] Primary School at the time of the incident and she knew the appellant as their neighbour, who used to attend a neighbouring school.

22. On cross-examination, PW2 indicated that when she went to their home, PW1 was in pain and she took her to hospital.

23. Dr. Aziz Manji, testified as PW3. He stated that he had worked at Kilifi District Hospital for 4 years and was familiar with the handwriting of Justine Chiro (name counter-checked against handwritten proceedings) who filled a Post Rape Care form for PW1 on 31st March, 2014. The findings were that PW1 had pain on the neck, bruises on the shoulder, and her hymen had been broken. She was treated. Pregnancy and syphilis tests turned out negative. PW3 produced the PRC form as P. exh. 1. He also had with him a P3 form filled by Dr. Mitei whom he had worked with. He knew his handwriting. PW3 testified that the P3 form indicated that defilement was reported. PW1 had pain on the neck, right shoulder and elbow. She also had bruises on the shoulder. Other findings were that her hymen had been broken. He produced the P3 form as P. exh. 2.

24. No. 66446 Corporal Philip Dzombo attached to Kilifi Police Station testified as PW4 although the proceedings erroneously indicate that he testified as PW1. He gave evidence that he took over investigations from Sergeant Kagwiria and others who were transferred.

25. It was his evidence that on 28th March, 2014, a report was made at the Gender Desk by PW1 aged 17 years who was in the company of her father. The report was that PW1 had gone to look for firewood when she met the appellant who had her book. He told her to accompany him to his house and when they got there, the appellant forcefully held her hand and put (sic) her in the house and defiled her. PW1 reported the incident to her parents, who reported to the Police. PW1's age assessment report was produced by Cpl. Dzombo as P. exh. 3. PW4 indicated that the appellant was later arrested by Police at Matsangoni and charged.

26. The appellant gave a sworn defence. He stated that he was R B T a resident of Roka. He was unemployed and the 1st born son. He further said that his father passed away. The appellant prayed for the court to look at both sides of the case.

ANALYSIS AND DETERMINATION

27. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced before the lower court and come to its own conclusions. This duty was explained in the case of **Okeno vs. Republic [1972] EA 32** where it was held that:-

"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 the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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."

28. The appellant in his 1st amended ground of appeal states that the charge leveled against him was defective as the charge sheet gave the age of the victim (PW1) as 17 years, yet the Doctor PW3 stated that she was 16 years old having been born in July, 1999; and that when the PRC form was filled 3 days later, she was 18 years old. Page 1 of the P3 form indeed gives the age of PW1 as 16 years. An age assessment was however done and a report thereof dated 4th April 2014 produced as P. exh. 3. It gave the age of PW1 as 17 years. The PRC form shows that PW1 was born in July, 1999. The date of birth is not given.

29. In the case of **Francis Omuroni vs Uganda**, Court of Appeal Criminal Appeal No. 2 of 2000, the court held thus:-

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and commonsense..."

30. Even if PW1 was between 17-18 years of age, the sentence that would have been meted out against the appellant would have been derived from the provisions of Section 8(4) of the Sexual Offences Act. The Court of Appeal in **Hadson Ali Mwachongo vs. Republic [2016] eKLR** had the following to say on age:-

"Section 2 of the Interpretation and General provisions Act defines "year" to mean a year according to the British calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year. Back to the Sexual Offences Act, a victim who is days or months above 11 years will be treated as 11 years old so long as he or she has not attained 12 years of age. On the same reasoning, the victim in this case who was 15 years, 6 months and 13 days old must be treated to be 15 rather than 16 years old."

31. This court finds that irrespective of PW1's age being indicated on page 1 of the P3 form as 16 years and the PRC form which gave her month and year of birth as July, 1999, the age assessment report in the absence of a birth certificate was conclusive evidence of PW1's age, in that she was 17 years old at the time she was defiled. I therefore find that the charge was not defective as alleged by the appellant. The case of **Stephen Mulili vs Republic** (supra) cited by the respondent is relevant to the issue of the documents, among others, that can be relied upon by the prosecution as proof of age.

32. The appellant submitted that he was a child when he was charged with the offence of defilement. This court has considered the foregoing submission and noted that when the appellant was put on his defence, he did not inform the trial court that he was under the age of 18 years when he was charged with offence of defilement. The said court would have sent the appellant for age assessment. It is therefore too late in the day for the appellant to bring up the issue on appeal.

33. On the issue of the age of injuries not being given by the Doctor who examined PW1. PW1's evidence was crystal clear that she was defiled by the appellant on 28th March, 2014. They went to report the incident to Kilifi Police Station on the same day and she was sent to hospital for medical examination. The medical examination on PW1 was done on the day after defilement as when she went to hospital on the evening of 28th March, 2014, she was told to go the following day. The P3 form shows that PW1 had tenderness and bruises on the shoulder and tenderness on the hand above the elbow and she also had tenderness on the neck region. These were no doubt injuries inflicted during defilement as PW1 stated that the appellant forcefully pulled her into his house, pushed her down and held her by the throat while defiling her. The P3 form indicated that her hymen was broken. The P3 form on page 2 indicates that the approximate age of injuries was "hours". I therefore hold that the prosecution proved that the appellant's penis penetrated the sexual organ of PW1.

34. On failure to conduct a DNA examination on the appellant to connect him to the offence of defilement against PW1, such an examination is not a mandatory requirement and failure to adduce such evidence does not water down the prosecution's case. The Court of Appeal in **George Kioji vs Republic**, CR App. No. 270 of 2012 (UR) stated thus:-

"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

35. The appellant questioned the *voire dire* process undertaken by the Hon. Magistrate and submitted that it was unnecessary. The appellant failed to show how the *voire dire* exercise prejudiced him and I hold that the said submissions do not benefit his case.

36. On the list of unresolved issues listed by the appellant in his written submissions, I hold that the P3 form and Post Rape Care form were adequate to prove the injuries suffered by PW1. Production of medical notes was not necessary in light to the foregoing. Rehema Kenga who informed PW2 about the defilement was not a material witness for the prosecution and in any event, the prosecution is under no obligation to call all the persons mentioned during the proceedings, but is duty bound to call those that will build its case.

37. On the failure to call the Investigating Officer, PW4 indicated that he took over investigations from a Police Officer who was transferred and made reference to the first report made by Sergeant Kagwiria. The evidence adduced by PW4 was based on what was recorded in the said report. The appellant did not in his submissions explain how the foregoing worked against him. In **Jeremiah Gathiku vs. Republic**, Criminal Appeal No. 73 of 2008, it was held as follows:-

"....the effect of failure to call police officers in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate."

38. On the expert who did the age assessment not being called to produce the age assessment report, the appellant at the hearing of the case did not raise any objection to the production of the age assessment report by PW3. The said report was therefore produced under the provisions of Section 77 of the Evidence Act. The appellant cannot now challenge the production of the said report on appeal.

39. The appellant's defence disclosed nothing much that would go to his aid as all he asked the court to do was to consider both sides of the case. The Hon. Magistrate did exactly that but found the evidence tendered by the prosecution was overwhelming as against the appellant. This court has no difficulties in reaching the same conclusion.

40. In conclusion, the conviction against the appellant was safe and the sentence meted against him was legal. The appeal is therefore without merit. It is hereby dismissed in its entirety. The appellant has the right to appeal within 14 days from the date of the delivery of this Judgment.

DELIVERED, DATED and SIGNED at MALINDI on this 12th day of April, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Njoki Keng'ara for the respondent

Mr. Oliver Musundi - Court Assistant